Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

**APPENDIX**

**IN THE**

# Supreme Court of the United States

**OCTOBER TERM, 1975**

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## No. 75-110

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**BERNARD A. SAKRAIDA,**
***Petitioner,***

**versus**

**AG PRO, INC.,**
***Respondent.***

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED JULY 17, 1975**
**CERTIORARI GRANTED OCTOBER 14, 1975**

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DOCKET ENTRIES

**In the United States District Court for the Western District of Texas, El Paso Division**

AG PRO, INC.

versus CA-68-118 EP

BERNARD A. SAKRAIDA

| Date | Proceedings |
|---|---|
| 10- 7-68 | 1) Plaintiff's complaint filed. |
| 10- 9-68 | Summons issued. |
| 10-28-68 | 2) Filed Defendant's Original Answer, in trip. |
| 10-18-68 | 3) Filed ret. summons to BERNARD A. SAKRAIDA, ex. 10-8-68 in El Paso, Tex. |
| 12-10-68 | 4) Filed Motion for Production of Document, in trip. |
| 12-10-68 | 5) Filed Brief in Support of Defendant's Motion for an Order for Production of Document, in trip. |
| 12-11-68 | 6) Filed Order for Production of Document, in dup. (Copies furnished counsel) |
| 5- 1-69 | 7) Filed Defendant's Motion to Produce, in dup. |
| 5- 6-69 | 8) Filed Motion for Production of Documents, in dup. (Plaintiff) |
| 5-12-69 | 9) Filed Defendant's Supplemental Motion to Produce, in dup. |
| 5- 9-69 | 10) Filed Plaintiff's Objections to Defendant's Motion to Produce, in dup. |
| 5- 9-69 | 11) Filed Plaintiff's Brief in Support of Objections to Defendant's Motion to Produce. in dup. |

5-16-69 12) Filed Deposition of Bernard A. Sakraida (Chg. to Pltfs.)

9-26-69 13) Filed Notice of Taking Deposition of Albert W. Gandt, in dup.

9-26-69 14) Filed Motion of Deft. for Protective Order Re Oral Deposition of Albert W. Gandt, in dup.

9-26-69 15) Filed Brief in Support of Deft's. Motion Re Oral Deposition of Albert W. Gandt, in dup.

11- 5-69 16) Filed Defendant's Motion for Summary Judgment, in dup.

11- 5-69 17) Filed Brief in Support of Defendant's Motion for Summary Judgment, in dup.

11- 5-69 18) Filed Transcript of Deposition upon Written Interrogatories of Albert W. Gandt, and Original Notice of Taking Deposition upon Written Interrogatories

11-20-69 19) Filed Plaintiff's Memorandum in Opposition to Deft's. Motion for Summary Judgment, in dup.

12-22-69 20) Filed Deft's. Supple. Brief in Support of His Motion for Summary Judgment.

12-22-69 Hearing on Defendant's Motion for Summary Judgment. After hearing arguments of counsel, the Court granted Plaintiff 2 weeks to file Amended Petition. No ruling on Motion.

1-19-70 21) Filed Motion for Permission to File an Amended Complaint, in dup.

1-19-70 22) Filed Supplemental Memorandum in Opposition to Deft's. Motion for Summary Judgment, in dup.



2-11-70 Additional Hearing in open Court on Defendant's Motion for Summary Judgment. After hearing additional arguments of counsel, the Court took the Motion under advisement.

2-19-70 23) Filed Judgment, in dup (Deft's. Motion for Summary Judgment Granted)

3-19-70 24) Filed Notice of Appeal

3-25-70 25) Filed Cost Bond on Appeal

4-23-70 26) Filed Designation of Contents of Record on Appeal (in letter form)

Plaintiff's Exhibit No. 1 — Book of Color Photographs.

3-26-71 27) Filed Opinion of the U.S. Court of Appeals, 5th Circuit

3-26-71 28) Filed CC Judgment in lieu of mandate of the U.S. Court of Appeals, decision of District Court reversed and remanded to U.S. District Court

3-26-71 29) Filed Copy of Bill of Costs, U.S. Court of Appeals for 5th Circuit

8- 4-71 30) Filed Deft's. Request for Admission of Genuineness of Documents, in dup.

8-19-71 31) Filed Plaintiff's Request for Admission, in dup.

8-19-71 32) Filed Response to Defendant's Request for Admission of Genuineness of Documents, in dup.

8-26-71 33) Filed Motion requesting trial by jury by Plaintiff, in dup.

8-26-71 34) Filed Response to Plaintiff's Request for Admission served August 20, 1971, in dup.

8-26-71 35) Filed Brief in Support of Jury Request, in dup.

9- 7-71 36) Filed Substance of Testimony by Pltfs expert M. G. Huber, in dup.

9- 8-71 37) Filed Memorandum of Testimony to be Offered by Robt. B. Price, Jr. as an Expert Witness on Behalf of Deft., in dup.

8-27-71 Motion for Jury Trial Denied.

9- 9-71 38) Filed Findings of Fact, in dup. (Plaintiff's)

9-13-71 Non-Jury Trial. Parties stipulate that all evidence admitted at Hearing on Motion for Summary Judgment may be considered as admitted in evidence on this trial. Counsel for Plaintiff made opening statement. Testimony presented for both sides and both sides rest and close. Both sides allowed to submit briefs and/or supplemental proposed Findings & Conclusions. Court will rule in 2 weeks.

9-23-71 39) Filed Findings of Fact.

9-23-71 40) Filed Final Judgment in favor of Defendant, Bernard A. Sakraida.

10-19-71 40(a) Filed Notice of Appeal

11-26-71 41) Filed Order extending time for filing Transcript of Proceedings to and including 1-17-72, in dup. (Cert. Copy mailed to U.S. Court of Appeals, 5th Circuit, New Orleans, La., 11-26-71)

12-29-71 42) Filed Transcript of Proceedings.

7-25-73 43) Filed CC of Opinion of the U.S. Court of Appeals, Fifth Circuit remanding case to the U.S. Dist. Court, with directions to enter judgment holding patent valid, subject to



Court's consideration of a motion under Rule 60(b)(2), F.R.Civ.P., to be filed in Dist. Court by Deft. Sakraida.

7-25-73 44) Filed CC of Judgment of U.S. Court of Appeals, 5th Circuit, issued in lieuof Mandate, remanding cause with directions in accordance with the opinion of June 25, 1973.

7-25-73 45) Filed Bill of Costs, U.S. Court of Appeals, 5th Circuit.

7-27-73 46) Filed Deft's. Motion for A New Trial, in dup.

8- 9-73 47) Filed Pltff's. Notice of Taking Deposition of W. C. Fairbank, in dup.

8-23-73 48) Filed Pltff's. Motion to Produce, in dup.

9-14-73 49) Filed Deft's. Response to Pltff's. Request for Production, Inspection and Copying of Documents, in dup.

9-14-73 50) Filed Deft's. Brief in Support of Its Response to Pltff's. in dup. Request for Production, Inspection and Copying of Documents,

9-17-73 51) Filed Deposition of W. C. Fairbank

9-26-73 52) Filed Pltff's. Memorandum in Response to Deft's. Objections to Production of Documents, in dup.

12- 4-73 53) Filed Request for Production of Documents Pursuant to Rule 34 F.R.C.P., in dup.

12- 7-73 54) Filed Order Overruling Plaintiff's Request for the Production of Documents, Served Under Date of Sept. 21, 1973. & Sustaining Defts. Objections Thereto. Copies mailed to Atty's. 12-10-73

12-10-73 55) Filed Motion to Recuse or Disqualify HON. ERNEST GUINN.

12- 5-73 Hearing on Motion to Produce — Court heard from both sides. Motion Denied. Another hearing on 12-18-73

12-18-73 56) Filed Motion to Produce, in dup. Called Joe Elliott to inform him.

1-17-74 57) Filed Defendant's Response to Plaintiff's Request for Production, Inspection and Copying of Documents

2- 6-74 58) Filed Memorandum in Opposition to Defendant's Motion for a new Trial.

2- 7-74 59) Filed Order which grants Motion for New Trial. copies to Attys.

2- 7-74 COURT RULED: Granted Motion for a new trial — expense of hearing cost of transcript — assessed against deft.

2- 6-74 Hearing on Motion to Produce under Rule 34 — Denied. (1) Notes, memorandum, etc. (2) 21 Letters, (3) Documentary Evidence. Motion for New Trial — Carried — rule invoked — witnesses sworn. Court takes under advisement until tomorrow morning at 11:30 A.M.

3- 6-74 60) Filed Notice of Appeal to 5th Circuit, CC mailed to New Orleans



In the United States District Court
for the Western District of Texas
El Paso Division

AG PRO, INC.,
Plaintiff,

versus CA No. CIV-68-118-EP

BERNARD A. SAKRAIDA,
Defendant.

## COMPLAINT FOR PATENT INFRINGEMENT

Comes now plaintiff and for cause of action against defendant alleges as follows:

I.

This action arises under the Patent Laws of the United States and jurisdiction is conferred on this Court by Title 28, United States Code, § 1338(a).

II.

Plaintiff is a corporation of the State of California with a principal place of business in Santa Rosa, California.

III.

Defendant is a resident of El Paso, Texas.

IV.

On December 14, 1965, United States Letters Patent 3,223,070 entitled "Dairy Establishment" were duly and legally issued to plaintiff as assignee of Donald

Joseph Gribble and Henry E. Bennett and plaintiff is the owner of the entire right, title and interest in and to said Letters Patent.

V.

Defendant has infringed said Letters Patent and will continue to do so unless enjoined by this Court.

VI.

Defendant has been on notice of said Letters Patent and his infringement thereof, has been willful, wanton and in deliberate disregard of plaintiff's rights.

WHEREFORE, plaintiff prays that:

1. Defendant be required to pay over and account to plaintiff for all gains, profits and advantages derived from his infringement of said Letters Patent.

2. Defendant be required to pay treble damages to plaintiff in view of his willful and wanton infringement.

3. The Court award reasonable attorney fees and costs of this action.

4. Plaintiff have such other and further relief as is just.

EDWARDS, BELK, HUNTER
& KERR

/s/ FRANK HUNTER
Frank Hunter
Attorneys for Plaintiff

Of Counsel:

KOLISCH & HARTWELL
J. Pierre Kolisch



[Title Omitted in Printing]

## DEFENDANT'S ORIGINAL ANSWER

Filed: Oct. 28, 1968

COMES NOW BERNARD A. SAKRAIDA, Defendant in the above styled and numbered action, and in Answer to the Complaint filed herein says:

### *FIRST DEFENSE*

The Complaint fails to state a claim against Defendant upon which relief can be granted.

### *SECOND DEFENSE*

Defendant admits the allegations in paragraph I of the Complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the Complaint; and denies each and all of the other allegations contained in the Complaint.

WHEREFORE, Defendant prays that Plaintiff take nothing by this its action and that Defendant have judgment of the Court, and that he have his costs herein expended.

/s/ J. F. HULSE
J. F. Hulse
11-D El Paso Nat. Bank Bldg.
El Paso, Texas 79901

Attorney for Defendant
OF COUNSEL:

OF COUNSEL:

SCOTT, HULSE, MARSHALL & FEUILLE
11-D El Paso Nat. Bank Bldg.
El Paso, Texas 79901

[Certificate of Service Omitted in Printing]

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[12] DEPOSITION OF BERNARD A. SAKRAIDA

Filed: May 16, 1969

BERNARD A. SAKRAIDA

CROSS EXAMINATION

BY MR. KOLISCH:

Q Now, Dawn Dairies had a manure flush system of the Agpro type?

A As you refer to it, yes.

Q I would like you to tell us what capacity you worked at the Dawn Dairy job?

A I worked as a supervisor. I did not have a general contract.

Q And the job was designed as I understand it, by Agpro, is that correct?

A That is correct.

Q And you worked closely with them on that job?

A Yes, sir.

Q Was that the first flush system job you worked on, Agpro type?

A The first one I had worked on of Agpro type, yes, sir.

Q Prior to Dawn Dairy, were you aware of any flush system of the Agpro type?



A For approximately several years before that. I had seen one at Pine Hill.

Q And that was another Agpro installation?

A Yes.

Q Any others?

A Not that I recall that was like their's, no.

* * *

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[12] DEPOSITION OF DONALD JOSEPH GRIBBLE

Filed: May 16, 1969

DONALD JOSEPH GRIBBLE

a witness, called by the Defendant, having first been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

CROSS EXAMINATION

BY MR. HULSE:

Q Will you state your name, please?

A Donald Joseph Gribble.

Q And where do you live?

A 1226 Cranbrook Drive, Hixson, Tennessee.

Q What is your business address?

A It's the same address, and P. O. Box 6052, Santa Rosa, California.

Q Did you formerly live in Santa Rosa, California?

A Yes.

Q How long have you been living in Tennessee?

A Since last September.

Q What is your occupation?
A I am an engineer.
Q Graduate of an engineering school?
A Yes, sir.
Q What school?
A Oregon State University.
Q What year?
A 1957.
[50] Q What degree?
A Bachelor of Science Degree in Agricultural Engineering.
Q Have you moved your place of business, substantially, then, to Tennessee from California?
A No. We have opened a branch office.
Q How large an organization do you have?
A In what terms?
Q Well, employees?
A Twelve to fifteen.
Q You do business through Agpro, Inc., do you not?
A Yes, sir.
Q Which is incorporated in the State of California?
A Yes, sir.
Q Does Agpro have a permit to do business in Tennessee?
A Yes.
Q And you have some — Agpro has some ten or fiteen employees?
A Yes.
Q Are there any of them besides yourself in Tennessee at the present time?
A Yes, sir.
Q What work is Agpro, Inc., primarily engaged in?
A We design agricultural facilities and manufacture some of the equipment used in the facilities.



[51] Q What all does that include, does that include barns? It includes dairy, I assume, from what we know about this case?
A Yes.
Q And besides dairies, what else do you do?
A Some work in beef operations, and poultry, and other animal-raising enterprises.
Q How long have you been engaged in this type of work yourself?
A Personally?
Q Yes.
A Since I got out of the Service in 1960. Prior to that, part time while going to college.
Q When was Agpro, Inc. incorporated?
A I believe '63, but I would want to verify that from my records.

* * * *

[52] Q Well, I will hand it over to you. I will ask you a question and I will hand it to you to look at it. Mr. Gribble, I want to ask you a couple of questions about a write-up, four pages, that appears to be run off on something similar to a mimeograph, headed, "Manure-Flush, Agpro, Inc., P. O. Box 6052, Santa Rosa, California", and just for the purpose of your identifying it, I will hand it to you. That is a paper which was put out by Agpro, Inc., was it not?
A Yes.
Q And that, I assume, is your write-up about —
A — Yes —
Q — the manure flush system.
A Yes.
Q May I have it back, please?
A Yes.

Q In the first paragraph, refers to a U.S. Patent Number, and the second paragraph says this covers [53] the hydraulic flush concept and so forth. And the third paragraph I want to ask you about. It says, "Basically, this method consists of releasing a large volume of water upon uniformly sloped alleyways." That, I assume, is the basic concept of the patent?

A Yes, sir.

Q Is there anything unusual about that, as stated in the sentence I just read to you?

A Yes, the accumulation of water in a large quantity to be released on that, such lanes, is a — or was at that time, a rather unique development for the clean-up and carrying away of animal waste.

Q So really what is unique about it is the amount of water, is that right?

A This is a difficult question, because it can vary tremendously, depending on the amount of offal to be cleaned up, and the type of animals, chickens, for instance, would represent a relatively small amount of water, of waste and water, where a long cow lane would represent a much large amount. So I don't know exactly how to answer your question.

Q Well, from the way you had stated your prior answer, I was just checking to see if my understanding was correct. I understood it, in essence, to be that the [54] collection of a large amount of water to be turned loose on these runways was what was unique.

A Yes.

* * * *

[57] Q My question is, is it not true, in view of your prior answer, that what you state is the unique thing about this so-called manure flush system, is the



amount of the water that is collected for the purpose of turning it loose on the alley-ways?

A No, there are several things that are unique about the system, as described.

Q Well, what else? Just enumerate them all for me, would you?

A The hinged water bins for holding, retaining the water, and releasing it. The careful relationship and attention to detail that has to be maintained between all flow areas of the barn, or the facility to be cleaned.

Q And this is what you call the basic concept on which the idea behind this patent is based?

A Yes.

Q And you originally had several different ideas about how the result could be accomplished, could be done, and you set them out here, one, two, three, and four in this paper, I believe, didn't you?

A Yes.

* * * *

[58] Q Did you prepare the claims that were presented in connection with the application for the patent?

A Yes.

Q Are you familiar with the claims?

A Yes, sir.

Q Are these claims as set out, in line with your idea on which the patent was based?

A Yes.

Q In the patent, your claims are set out there in three numbered paragraphs, are they not, or do you [59] recall?

A Yes, as I recall.

Q And in Claim Number 1, which appears in Column Number 6 of this patent, the first thing set out is an evenly contoured, paved surface, forming a floor, providing a walking surface for cows in the barn. Is — I'm not sure that I know what is meant by "evenly contoured"; does that mean a smooth surface, or what?

A Relatively to the hydraulic movement of the water. It wouldn't necessarily be a level surface; for instance, it goes around the corner, the sides might be raised or banked similar to the bank.

Q But where is — do you propose by this to have a flat surface, but tilted so that the plane is not quite horizontal?

A That's an element of the design, yes.

Q And I am trying to find out, I don't know what is meant by this word, "contoured", really, is what I don't really know what it means here.

A The most effective removal of the waste material is not obtained with a flat surface, from side to side. We use a small amount of crown, generally. The amount depends on the width of the lane.

Q Well, using a small amount of crown, do you mean by [60] that, something like the crown that they have had in some of these old highways where it is sort of leveled up towards the center and comes down on each side?

A That would be an exaggerated example, yes.

Q Well, could you tell me what you mean by it as appears in this Claim I that I just read this clause from. Let's just back up and start over, what do you mean by this word, "contoured" as used here?

A It would have to do with the shape of the top surface of the floor.

Q And what shape would that call for, then?



A Relatively smooth, with a slope in one direction, and then depending on corners and such things that would have to be negotiated, and the location of the manure on the floor.

Q In other words, you may bank it at the corners, where the water has to go around the bend, or something, or corner?

A This is sometimes done, yes. And along a row of free stalls, where the bulk of the manure would perhaps accumulate, next to the curb, the floor would be either crowned or tilted slightly in that direction. The contour, as I would interpret it, is the general shape of the surface of the floor.

[61] Q Well, looking at the first page of the drawings attached to that patent, the different areas are numbered here, which maybe will help us. Number 30 here, is a tank for the water?

A Yes.

Q And 26 is the alley-way which is to be washed off?

A Yes.

Q Well, now are we talking about a contoured surface for 26?

A Yes.

Q And as 26 appears on this drawing here, would this be a flat surface, but tilted at a slight angle toward 15-a?

A Yes. 15-a?

Q Yes.

A Yes.

Q And what's contoured about it, then?

A Well, what is your idea of contour?

Q Well, I don't know, I'm trying to find out, my idea of contour — the only contour I know is one of these

relief maps, that shows mountains and valleys and ridges, and all that kind of stuff.

A Yeah. Right, it describes the top surface of a plane, or of some object. And the contours, in this case, are describing the top surface of the floor.

[62] Q Well, I understand that from what you have just said, but I don't know what kind of a floor we are going to get here, when you say "contour" —

A — in that particular case —

Q — are we going to get the Rocky Mountains, or the Appalachians, or the Mississippi Valley; what are we going to get here?

A In that particular case, you would have a relatively level surface, laterally, and a slope in the direction toward 15-a, with a small amount of crown in the center.

Q That's what really wanted to know. A small amount of crown in the center?

A Yes.

Q And in this Claim I, following that statement, which I originally read from this Claim I, it also says "drain means for draining wash water from such floor opening at the top of the floor." That's just like a little ditch, or something, isn't it?

A Where are you reading now?

Q Where it says "drain", right down in here somewhere.

A I haven't found that sentence you read yet.

Q Right here. Starting right there at that mark.

A What is your question?

Q My question is that that drain that is referred to [63] there is simply a groove, or a small ditch, or something, designed to drain water?



A I'm not sure if the intent here is to describe the collection drain or the dispensing.

* * * *

[65] Q Then where is the drain that is referred to in what we just read?

A The collection drain on this type of a lay-out, would be at this point.

Q You pointed down here, somewhere in the vicinity of the shaded area that is marked, "20".

A Twenty.

Q Is that what is referred to there, where it refers to that drain?

A Just a moment. Grate 20, yes. That is the grate covering.

Q Well, what kind of a set-up is this Item 20 here?

A It can be a graded ditch or a ditch with — arranged like a scupper, or a ditch covered with a steel door that can be opened to collect the drainage.

Q Well, where this Item 20 is, there is a ditch there, then, is there, which is covered by a grate?

A Yes.

Q And into which this water will flow?

A Yes.

Q So the drain is actually a ditch, isn't it?

A Yes.

Q Now, is there anything unique about having a ditch for a drain?

[66] A These particular ditches have to be designed in such a way that they can accept very high flow rates. The flushing water in a typical installation would be perhaps from two thousand to three thousand gallon, which evacuates the holding tank in a few

second and would arrive at the ditch over a period of perhaps 30 seconds. So the ditch must be large and of a cross section to accept such loads.

Q Beginning with that second check mark there, for the ease of finding what I am reading about, it picks up where I left off before. This Claim I further says, "Said smooth, evenly contoured surface which forms such floor, sloping towards said drain, drain means whereby wash water discharged on the floor may be collected and disposed of through said drain means, picking up that part of it there, and referring back to Sheet 1 of these drawings.

A Yes.

Q Where is the floor that they are referring to there on this Sheet 1, could you point it out by number?

A It would be the floor area from the collection tank to the point where the drainage enters into —

Q — clear on down into the drain?

A Enters the ditch.

Q It would be, then, these that are labeled, "26" and [67] either all or parts of 15?

A Yes, except these numbers may be misleading. It's in the area where those numbers exist, but not necessarily those numbers.

Q So what we have there is a smooth, evenly contoured surface, sloping towards the drain, so that the water will flow down to the drain —

A — yes —

Q — that's what it amounts to?

A Yes.

Q And all that means is that it's — you have got a smooth surface where this water will flow from where it's turned loose, down to where it is picked up in the drains?



A Contoured in such a way that the water will flow in a uniform sheet to cover the surface, picking up all of the waste material as it travels along.

Q And then, beginning where I left off, reading from that Claim I, "Said barn further includes a multiple rest areas, individual stalls for each cow, and with each of said stalls having a bottom which is also a smooth pavement. That's likewise shown on this Drawing I, these individual stalls are shown on either side of those alley-ways —

A — yes, sir —

[68] Q — there, the Number 26?

A Yes.

Q And that's similar to dairy stalls in general, is it not?

A Yes.

Q And then it goes ahead to say, "But which is disposed at an elevation above the paved surface forming the floor." Which means the floor of the stall is raised somewhat above the level of the floor of the rest of the building?

A Yes.

Q That is typical dairy construction?

A Yes.

Q "And with each of said stalls having a bottom, which is also a smooth pavement." And that is also typical dairy construction, is it not?

A Yes, the term "pavement" might be misleading, because it could be hard packed earth, or other material.

Q Any kind of a hard floor?

A Yes.

Q "But which is disposed at an elevation above the paved surface forming the floor." Well, that's the same thing we just mentioned a minute ago, that this floor of

the stall is above the floor of the rest of the dairy barn?

[69] A Yes.

Q "Said stalls being dimensioned so that a cow can comfortably stand or lie in the stall." And that is typical dairy construction, isn't it?

A Yes.

Q And as to which there are variations from one installation to another, are there not?

A Yes.

Q And that's true whether it is done by you, or done by somebody else, isn't it? That the dimensions vary from one installation to another?

A Yes.

Q Depends on several different things, doesn't it?

A Right, breed of the cows, and such things as that.

Q "So the cow can comfortably stand or lie in the stall but offal from the cow falls outside the stall bottom and onto the floor, providing a walking surface in the barn." And that is in line with typical dairy construction, is it not?

A Yes.

Q They were making them that way long before 1965, weren't they?

A Yes. A lot of this is description to —.

Q Description, isn't it?

A Yes.

[70] Q And it is description of what has been common in the dairy business for a long, long time, isn't it?

A It is description necessary to frame the flush concept, in this instance.

Q And then it goes ahead to say, "said barn, further including defined feeding areas, having feeding troughs, with means for discharging feed to the troughs." That is typical dairy construction, isn't it?

A Yes.



Q And it has been used over a long period of time, hasn't it?

A Yes.

Q "The cow holding area . . ." That is also typical of dairy construction?

A Yes.

Q And that has been used over a long period of time?

A Yes.

Q "A milking area." Now, they have all got a milking area?

A Yes.

Q And always have had, wherever they have had a dairy barn, haven't they?

A Yes.

Q "And a transfer area." And they have all got transfer [71] areas?

A Yes, generally, yes.

Q ". . . on bottom, but the walking surface forming said floor in the barn, and the floor-washing means for washing the floor, providing a walking surface in the barn, where said floor bottoms . . ." I'm not sure I can read this and follow it, all at the same time, because it's got such long clauses. "Said feeding, holding, milking, and transfer areas operable to send wash water flowing over the floor, with such water washing any cow offal thereon into said drain means." Well, all that means is it is fixed so that when the water is turned loose, it is supposed to wash the offal off?

A What this means is that these various areas described are disposed of elevations and slopes, and joined together such that this water, as it flows down there, will move a uniform sheet and carry all the waste material to the drain means. As opposed to a

typical drain in a floor, or a sloped floor, which might be beveled, or lowered into a "V" type trough to carry the water down the channel.

* * * *

[72] Q That's generally the old tub idea, isn't it? You just dump a tub of water on the floor and it flows down the floor if the floor has got a slope to it?

A I'm not familiar with the old tub principal.

Q Well, you know what a tub of water will do if you dump it out onto the floor that has got a three percent grade to it, don't you?

A Yes.

Q That's essentially the same thing right there, isn't it?

A No.

Q In what way is it different?

A In the volumes involved and means of dispensing the [73] water.

Q You mean it's not out of a tub, and it is more water?

A Yes.

Q And III, which is over on the next page, is really the gist of your idea as about how this ought to be done, is it? Where it says, the "Barn of Claim I, wherein said floor washing means comprises a dam for damming and collecting water as a pool, directly on the floor, and such dam is abruptly openable to send such water as a sheet over the floor, towards said drain means"?

A This has proven to be the most economical construction, as far as the water storage vessel.

Q So instead of putting it in a tub, you have got it behind a dam, where the door will open and let it go right on down right quick?



A Yes, right.

Q And it holds a lot more water than you can put in an ordinary wash tub?

A Right.

Q And that's really the gist of the whole thing, isn't it?

A It's the basic concept of manure flush, yes.

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[16] DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Title Omitted in Printing]

Filed: Nov. 5, 1969

Defendant moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a Summary Judgment in the Defendant's favor dismissing the action on the ground there is no genuine issue as to any material fact and that the Defendant is entitled to a Judgment as a matter of law.

This Motion is based upon:

(a) A copy of the Patent No. 3,223,070 referred to in Plaintiff's Bill of Complaint.

(b) The transcript of oral depositions of D. J. Gribble and of Bernard A. Sakraida.

(c) Affidavit of W. C. Fairbank.

(d) Affidavit of Bernard A. Sakraida.

(e) Affidavit of Archie Sharp.

(f) Patent file as furnished by Plaintiff.

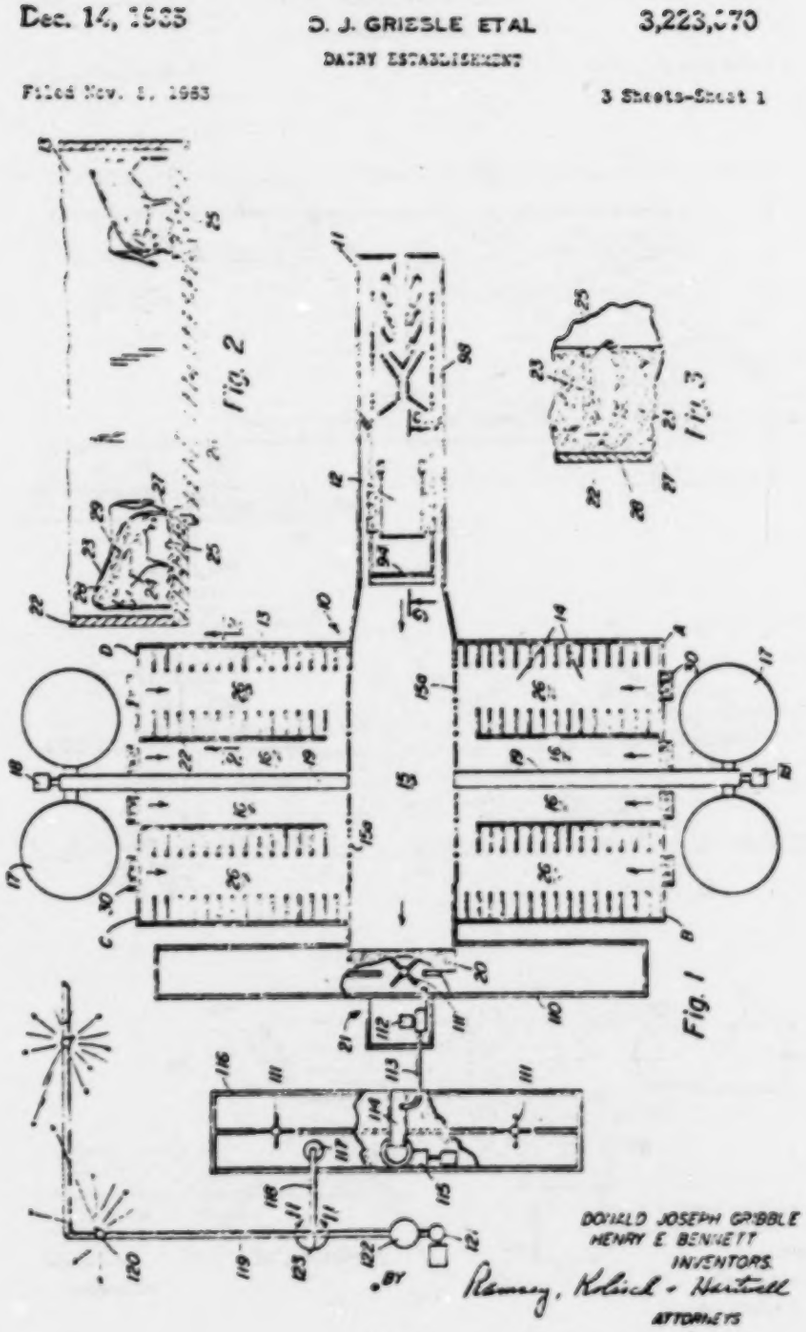
Items (a), (c), (d), (e), and (f) are attached hereto. Item (b) is on file in the Clerk's office.

/s/ J. F. HULSE
J. F. Hulse
SCOTT, HULSE, MARSHALL
& FEUILLE
11-D El Paso Nat. Bank Bldg.
El Paso, Texas 79901
Attorney for Defendant

[Certificate of Service Omitted in Printing]



EXHIBIT A



Dec. 14, 1965 D. J. GRIBBLE ETAL 3,223,070

DAIRY ESTABLISHMENT

Filed Nov. 5, 1963 3 Sheets-Sheet 2

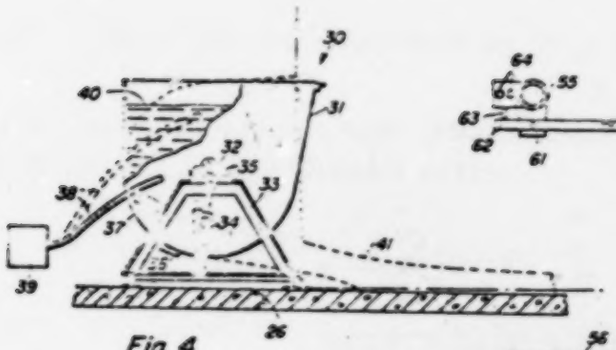


Fig. 4

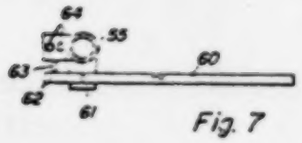


Fig. 7



Fig. 8

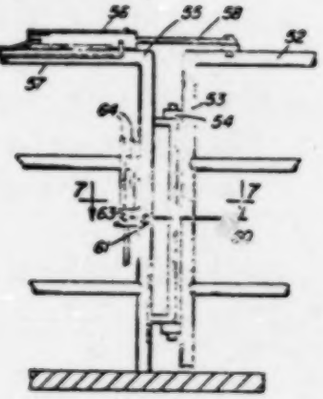


Fig. 6

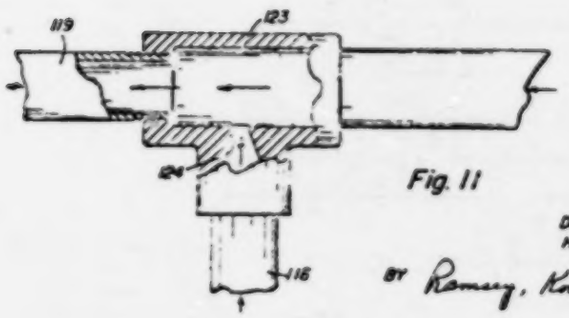


Fig. 11

DONALD JOSEPH GRIBBLE
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BY Ramsey, Kolisch & Hartwell
ATTORNEYS



Dec. 14, 1965 D. J. GRIBBLE ETAL 3,223,070

DAIRY ESTABLISHMENT

Filed Nov. 5, 1963 3 Sheets-Sheet 3

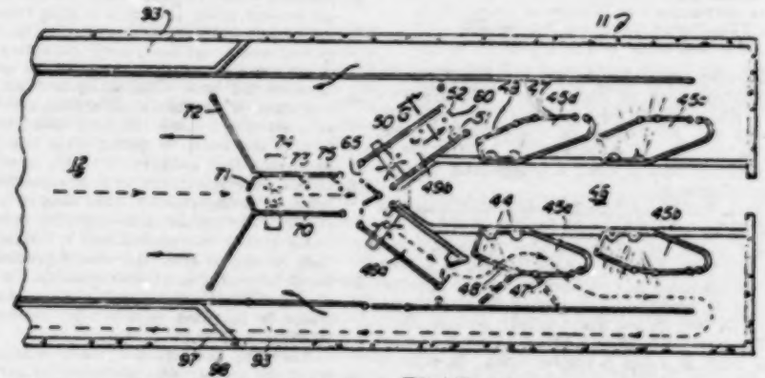

Fig. 5

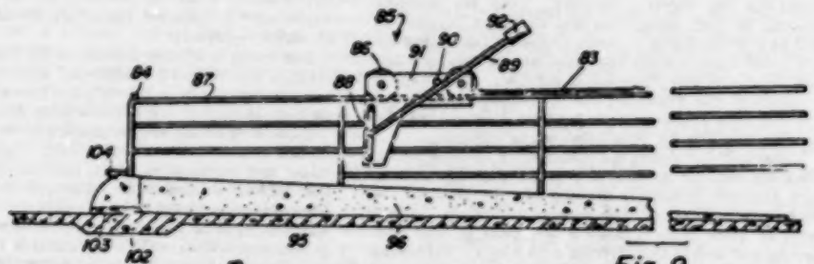

Fig. 9

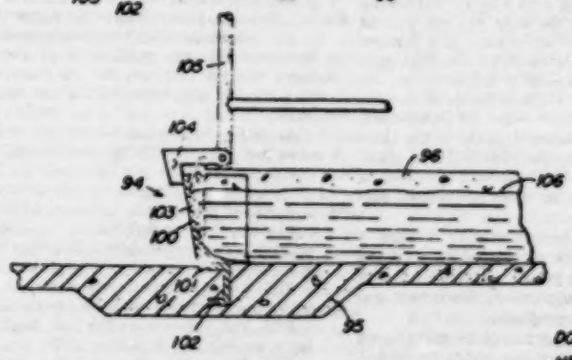

Fig. 10

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United States Patent Office

3,223,070

Patented Dec. 14, 1965

1

3,223,070

# DAIRY [illegible]

Donald Joseph C[illegible] and Henry E. Bennett, Santa Rosa, Calif., assignors to AC [illegible] Inc., Santa Rosa, Calif., a corporation of California

Filed Nov. 5, 1963, Ser. No. 321,612
3 Claims. (Cl. 119—15)

This invention relates to method and equipment for care and maintenance of domesticated food-producing animals. While the invention is particularly applicable to the care and maintenance of milk-producing cows, and will be described in relation to the construction of a dairy barn and care of cows, it is applicable to other domesticated animals.

Ever since man domesticated animals, their care and maintenance has involved a great amount of hand labor, particularly in the case of milk-producing animals such as cows which are kept for periods of time in a barn. It is recognized today that in order to achieve optimum results in milk production, cows must be properly fed and cared for and milked under strictly sanitary conditions. The removal of cow offal from a barn is as much of a task today as it was in ancient times. In order to produce good, sweet milk, it is important that there be no accumulations of cow manure and urine in the barn because milk readily absorbs odors directly as well as through the respiratory system of the cows. Furthermore, accumulations of manure in the usual piles or lagoons employed in connection with dairy operations are obnoxious and highly unsanitary. They are breeding grounds for flies, mosquitoes and all forms of pests as well as a prime source of water contamination. Seepage and runoff from manure accumulations contaminate surface as well as subsurface water supplies. According to a feature of our invention, this is completely eliminated and cow offal is continuously removed from a barn and put into condition for expeditious use as fertilizer.

Under known dairying techniques cows are maintained, when the weather permits, in pastures near the milking barn and are periodically brought into the barn for the purpose of milking and then returned to pasture. Movement of cows between pasture and barn is time consuming and entails considerable man hours. Permitting cows to graze a pasture is not the most efficient way of feeding them. When cows are turned loose in a pasture, they graze it unevenly, trample much of the feed, and the manner in which their manure is deposited on the ground destroys the feed with which it comes in contact and doesn't do the ground much good. Furthermore, flies and other undesirable pests are attracted to the area. From the foregoing, it will be appreciated that a given field will produce more and better feed if the feed is removed therefrom and fed to the cows rather than permitting them to graze.

The object of the present invention is to provide a really completely sanitary dairy system which produces uniformly high-quality milk in greater quantities per cow than heretofore produced at substantially lower cost and with much greater ease to the producer.

The object of the invention is achieved by maintaining a herd of dairy cows under controlled, sanitary conditions. Pasturing of cows is completely eliminated. The cows are maintained in a large barn having various areas in which the cows rest, eat, and are milked on a controlled cyclical schedule. Cows are known to be creatures of habit and they readily adapt themselves to moving at the desired times from one area to another. Substantial hand labor and man hours are eliminated by keeping the cows relatively confined and the quantity and quality of their milk is markedly enhanced.

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According to a feature of the present invention, the areas in which the cows are confined are so constructed that they can be periodically flushed clean by water which is collected and utilized thereafter. Some of the waste products which accumulate on the floor of a dairy barn are manure, urine, feed, stall bedding material, and milk. All of this waste is removed by the flushing water and formed into a fertilizer slurry which may be applied by suitable sprinkler irrigation mechanism to the fields surrounding the barn. The slurry is diluted to an extent that there is no objectionable odor and flies and other pests are not attracted. There is little fertilizer value loss because the slurry is applied while still relatively fresh to the soil in a condition in which it can be easily absorbed. An application of slurry to a field may be followed by an application of clear water which will wash out the sprinkler system and clean the foliage in a field. Much greater soil productivity is thereby achieved and feed, as well as other agricultural products, can be produced in greater and better quantity. If desirable, it is also possible to transport the slurry by tank cars or trucks to locations remote from the barn for use as fertilizer.

According to a feature of the invention, the areas over which the cows are free to roam in the barn are of a hard-paved surface, such as concrete, and are on a slight angle so as to permit drainage in a desired direction into collecting tanks. Water-dispensing means are so constructed and positioned that they can be automatically actuated at predetermined times to release relatively large quantities of water for washing the barn floors. The wash water is collected for subsequent fertilizer use, as previously mentioned.

According to another feature of the invention, the rest stalls of the cows are constructed so that a cow's body can comfortably fit in the stall, but cow offal is deposited outside the stall on the concrete floor which is flushed.

According to still another feature of the invention, just before a cow moves into milking position, the cow's udder and surrounding areas, such as flanks and lower rear legs are washed clean. The cow is also stimulated for easier and quicker milking. In this process, the cow's udder is subjected to a spray of warm water and thereafter primed for milking. This stimulates the cow to let her milk down and immediately thereafter the cow is milked. A cow which is milked according to the method of the invention not only produces more and better milk, but udder damage and mastitis are materially reduced and the period of time over which a cow will be productive is increased.

According to still another feature of the invention, the cows just prior to milking pass through a series of stalls having gates which are operated by the movement of the cows whereby each cow will be in a milking station at a desired time and in optimum milking condition.

These and other features of the invention will be explained in greater detail in conjunction with the drawings, in which:

FIG. 1 is a schematic top plan view of a dairy installation in accordance with the present invention;

FIG. 2 is a section on the lines 2—2 of FIG. 1, showing cows standing in resting stalls;

FIG. 3 is a top plan view of a cow lying down in a resting stall;

FIG. 4 is a side elevation of a water-dispensing dump tank according to the invention;

FIG. 5 is an enlarged top plan view of the milking area of the barn of FIG. 1;

FIG. 6 is a section on lines 6—6 of FIG. 5, showing a gate;

FIG. 7 is a section on lines 7—7 of FIG. 6, showing mounting of control rod and gate;



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FIG. 8 is a top plan view of a portion of the front gate and spray-washing mechanism of the washing stall of FIG. 5;

FIG. 9 is a side elevation partly in section of a portion of the cow-holding area, dam in lowered position, and crowding mechanism;

FIG. 10 is an enlarged side elevation partly in section of a portion of FIG. 9, showing the dam in raised position; and

FIG. 11 is an enlarged side elevation partly in section on lines 11—11 of FIG. 10, showing a venturi connection.

Referring to FIG. 1, there is generally indicated at 10 a building enclosure or barn which is divided into various areas. Milking wing 11 has a cow-holding area 12 in which cows are confined just prior to milking. The cows are maintained in groups or units indicated at A, B, C, D in FIG. 1. The cows from a particular group are milked together and the milking times of the various groups may be arranged so as to provide for a convenient schedule of milking the cows and cleansing of the various areas of the barn. Each cow has her own stall 13 within a resting area 14 that corresponds with her particular group. Each resting area opens on to a central transfer or roaming area 15 and feeding areas 16. Gates 15a control movement of the cows from the rest and feeding areas into the transfer area. The cows are not confined to their stalls and are free to move between rest and feeding areas as they desire. This will, of course, usually be when feed is made available to them in the manner about to be described.

Feed-storage silos 17 are connected by suitable mechanically driven and controlled conveyer means 18 to feed troughs 19 in feeding areas 16. Mechanism 18 may be adjusted to deliver the amount, type, and frequency of feed desired to troughs 19. If desired, each silo can be filled with a different type of feed which is metered in predetermined amounts to the automatic conveyer mechanism which deposits it in the feed trough where it is freely accessible to the cows.

It will be appreciated that the number of groups of cows, as well as the number of cows in each group, can be varied and the construction of the barn will be appropriately adjusted.

All of the floor area of the barn over which cows are permitted to walk is covered by a relatively smooth, hard surface, such as concrete, which will satisfactorily withstand repeated washings. The floors are sloped so as to permit drainage towards grate 20 of a fertilizer recovery and utilization system, generally indicated at 21. A uniform slope of the barn floors at a rate of around three feet per hundred feet has been found to be satisfactory.

As best seen in FIGS. 2 and 3, each of the cow-resting stalls 13 is defined by a front wall 22, side-dividing and cross members 23, 24, and floor 25 which is raised above the level of alley floor 26. The length and width of a stall 13 is such that a milking cow of a particular breed can comfortably accommodate herself in a stall in either standing or lying position. Commercially operated dairies usually milk only cows of a particular breed whose sizes do not vary materially. However, if for any reason it is necessary to accommodate cows of varying sizes and dimensions, the stalls can be varied by use of a movable neckboard 28 on sloped guide rails 29 whereby the board may be adjusted depending on the length and height of a particular cow. The important consideration in either case is that the size of the stall is such that all cow offal falls outside the stall and is deposited in alley 26, which is sloped as previously mentioned. The cows are prevented from turning in their stalls and their bedding 27 remains clean and dry and off of the floor areas subjected to water flushing, as hereinafter described.

At the uphill end of each alley 26, means for releasing a relatively large amount of water to flush the alleys clean are provided. The water-releasing means may conveniently take the form of dump tanks 30 (FIG. 4),

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comprising a large water-holding container 31 pivotally supported at either end on axle shafts 32 suitably mounted on frames 33 resting on alley floor 26. Shock absorbers 34 are connected by cranks 35 to shafts 32. Counterweight 36 is mounted on the back side of container 31. Adjustable return springs 37 are mounted on either end of container 31 and adapted to engage the frame 33 to position the tank in upright position. Water-inlet hose 38 is connected at one end to the tank and at another end to water-control means 39, which may be adjusted depending on the desired rate of water flow in the tank. When container 31 is filled above line 40, the tank tips forward and dumps a sheet of water 41 on the floor. The empty tank is returned to upright position by the counterweight for refilling. It will be appreciated that a tank may be adjusted automatically to release desired amounts of flushing water on a cyclical basis, such as every four hours.

Turning now to the milking wing, as seen best in FIGS. 1 and 5, four milking station stalls 45a, 45b, 45c, 45d are positioned around a pit 45. Inside the pit an operator stands and applies connections from the automatic milking machines (not shown) to the cows. Each milking stall has a pair of air-operated gates 47, 48 which are controlled by the operator through suitable control mechanism (not shown). When operated, the gates swing open to a position shown in dotted lines in FIG. 5, permitting a cow which has been milked to leave the stall and the next cow to be milked to enter the stall. Water sprays 44 continuously spray water on the floor in the milking stalls in order continuously to remove spilled milk and any cow offal. Immediately behind milking stalls 45c and 45d there are two milk stimulation stalls 49a, 49b, each having sprays 50 for directing warm water or warm drying air against the udder and surrounding areas of a cow standing in the stall. A feed box 51 is provided at the forward end of each stimulation stall into which, through automatic means (not shown), a predetermined amount of feed is placed in the box each time a cow comes in the stall.

Referring to FIGS. 6 and 7, there will be explained the construction and operation of gate 52 in stall 49b which is similar to the other air-operated gates employed in the other stalls in the milking area. Post 53 of gate 52 is hinged at 54 to post 55 of the stall. Cylinder 56 mounted on rail 57 is connected by piston 58 to gate 52. Air lines 59 are connected at one end to cylinder 56 and at the other end (not shown) to actuating means controlled by opening of gates 47, 48 of milking stalls 45c, 45d, whereby when one of those milking stalls is free, gate 52 opens and a cow within stall 49b is free to enter the open milking stall. Control rod 60 is pivotally mounted at 61 on post 55 at the front of the stall and operated by the cow as she leaves the stall. Back end 62 of rod 60 is adapted to engage plunger 63 of air lines 64 which control closing of gate 52 behind the cow and opens a gate 65 permitting a cow to pass from washing stall 70 into whichever of stalls 49a or 49b is open.

A cow enters washing stall 70 through gates 71 flanked by guide rails 72 when the gates are opened under control of gate 48 of a milking stall opening. As a cow moves into stall 70, she engages a control rod 73 in the stall that actuates spray heads 74 positioned in the floor of the stall to eject a spray of water that will wash the udder and surrounding areas of the cow standing in the stall. Heads 74 are turned off when gate 75 of the stall opens to permit a cow to leave the washing stall.

Referring to FIG. 8, mechanism for controlling spray heads 74 is shown. Cylinder 76 is mounted on post 77 of the stall. Piston 78 of the cylinder is connected at 79 to gate 75. Operation of piston 78 is by air lines 80 which are controlled by opening of gates 65. When gate 75 is in closed position shown in dotted lines, it engages plunger 81 permitting water to pass through conduit 82

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to heads 74. Opening of gate 75 disengages plunger 81 and shuts off water to heads 74.

When the cows are ready for milking, they will naturally congregate in the milking area. In order to expedite their movement through the milking stations and segregate the cows who are to be milked, there is provided in holding area 12 which leads into the milking area, a crowding device generally indicated at 85 (FIG. 9) one-half of which is shown, the other half being the same. Rollers 85 ride along top rail 87 on either side of the holding area. Transverse rails 88 extend between each half of the crowding device and are connected to one end of lever 89 which is pivotally mounted at 90 to side plate 91 hanging from wheels 86. A weight 92 is provided at the other end of lever 89. When the lever is pushed down, rails 88 are swung up permitting cows to pass underneath. When the cows are all inside the rails, they are lowered and as it is desired to move cows through holding area 12 in the direction of dashed arrow lines (FIG. 5), the crowding device is moved forwardly in the direction of the solid arrow (FIG. 9) by pulling cable 23. A stop 84 is positioned at the end of rail 87 to limit backward movement of the crowding device. The cows will one at a time then proceed through the washing, milk stimulation, and milking stalls in the direction of the dotted arrows (FIG. 5). Once a cow has been milked, she will leave the milking area of her own volition down cow-return alleys 93 to area 15, and to her stall or feeding area. The system of gates and rails will prevent her from mingling with cows in the holding area awaiting milking.

Near the juncture of holding area 12 and transfer-roaming area 15, a dam 94 is provided for controlling flow of flushing water from the milking area. Floor 95 of the milking area slopes into area 15 which slopes toward grate 20 at about a pitch of 3' in 100'. Water-retaining walls 96 extend along either side of the holding area. Wings 97 extend from one end of walls 96 to side walls 98 of the milking wing and dam 94 extends between the other two ends of the water-retaining walls. The dam comprises a steel plate 100 (FIGS. 9, 10) which at 101 is hinged to a channel iron 102 embedded in floor 95. A sheet of tough rubber-like material 103 prevents leakage of water between the plate and channel and along the sides when the dam is raised as shown in FIG. 10. A catch 104 on post 105 holds the dam closed when it is in raised position. When the catch is released, the dam is free to fall flat on the floor, as shown in FIG. 9. It is in the latter position while a group of cows are passing into the holding area preparatory to milking. Once all the cows are confined in area 12, the dam is raised to retain flushing water coming in the milking area. Water behind the dam may rise up to line 106. After a group of cows have been milked, dam 94 is dropped and a relatively large volume of water is released into area 15 which is thereby cleansed.

It will be seen from the foregoing that all of the water which is used to flush the floors of the barn drains toward grate 20 which is so constructed as to permit the water and entrapped offal to collect in tank 110 of the fertilizer recovery and utilization system (FIG. 1). Tank 110 may conveniently be placed underground and an agitator 111 in the tank mixes the water and offal into a slurry. Pump 112 and pipe 113 pass the slurry through a dewatering device 114 from which excess water is removed, and through a grinder 115 which grinds all large solids, feed, rest stall bedding material, etc., to a size small enough to pass through a sprinkler. The resulting slurry is maintained in another storage tank 116 having agitators 111 therein. When fertilizer slurry is desired, pump 117 pumps it from the tank into pipes 118, 119 connected to sprinklers 120 in the fields adjoining the barn. There is also connected to pipe 119 a source of clean water and pump 121 which pumps water under pressure into pressure tank 122.

Referring to FIG. 11, there is shown one way—venturi action—of passing slurry through the sprinkler system. At the juncture of pipes 118, 119 there is a coupling 123 and a restricted orifice 124 in pipe 118. Slurry under pressure passes through orifice 124 where it is mixed with clean water under pressure from tank 122 and moves in the direction of the arrows to the sprinklers. In place of the venturi a high pressure centrifugal or other suitable type of pump could be used in the system.

It will be appreciated that the amount and mixture of fertilizer slurry can be controlled as desired. Also, after fertilizer slurry has been deposited in the fields, clean water can be sent through the pipes in order to wash them out and any fertilizer remaining on the foliage. In this way the fertilizer is washed into the ground, and there are no obnoxious odors or attraction for flies and other pests. If, in the winter or at other times, it is not desired to fertilize the adjoining fields, the storage tanks may be emptied into tank cars or the like for transportation of the fertilizer to other areas where it may be utilized.

It will be noted from the foregoing description of the invention that personnel to operate a dairy barn have been greatly reduced from that normally employed and that the cows to a great extent have been left free to move of their own volition. It has been found that cows are creatures of habit and learn a routine quickly, particularly where it is to their comfort and advantage. Cows therefore lend themselves readily to the desired cyclical movements from one area to another at the desired times with a minimum of human effort.

While the system has been explained with respect to specific embodiments of the invention, it will be appreciated by those skilled in the art that various changes may be made in the construction without departing from the scope of the invention as defined in the appended claims.

It is claimed and desired to secure by Letters Patent:

1. A dairy barn for cows and the like including a smooth, evenly contoured paved surface forming a floor providing a walking surface for cows in the barn, drain means for draining wash water from such floor opening to the top of the floor, said smooth, evenly contoured surface which forms such floor sloping toward said drain means whereby wash water discharged on the floor may be collected and disposed of through said drain means, said barn further including multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also of smooth pavement but which is disposed at an elevation above the paved surface forming the floor, said stalls being dimensioned so that a cow can comfortably stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn, said barn further including defined feeding areas having feeding troughs with means for discharging feed to the troughs, a cow-holding area, a milking area and a transfer area all bottomed with the walking surface forming said floor in the barn, and floor-washing means for washing the floor providing the walking surface in the barn where said floor bottoms said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into said drain means, said floor-washing means including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over said floor.

2. The barn of claim 1, wherein said floor-washing means comprises a water dump tank disposed above the floor, and a mounting for the tank including means whereby the same may be tipped thereby to allow the contents of the tank to escape abruptly from adjacent the top of the tank and to cascade onto the floor to form a sheet of water thereon.



3. The barn of claim 1, wherein said floor-washing means comprises a dam for damming and collecting water as a pool directly on the floor, and said dam is abruptly openable to send such water as a sheet over the floor toward said drain means.

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SAMUEL KOREN, *Primary Examiner.*

HUGH R. CHAMBLEE, ALDRICH F. MEDBERY, *Examiners.*

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EXHIBIT C

THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

BEFORE ME, a Notary Public, in and for said County and State, on this day personally appeared W. C. Fairbank, who, having been by me first duly sworn, upon his oath deposed and said:

That he resides in Riverside, California, is an agricultural engineer by training and practice, and is employed as Extension Agricultural Engineer, Department of Agricultural Engineering, University of California, Riverside, California; and that he has personal knowledge of the facts hereinafter set out.

1. That he is a graduate of University of California, and received a degree as an agricultural engineer in 1950; that he has been employed by the University of California as an agricultural engineer for 11 years, and has been so employed in the Riverside, California Branch of the University of California for 4 years.

2. That a dairy barn for cows

(a) having a smooth, evenly contoured, paved surface as a floor, which provides a walking surface for cows in the dairy barn;

(b) having a drain as a means for draining wash water from an evenly contoured, paved surface, forming the floor of such barn, opening to the top of the floor;



(c) having an evenly contoured surface forming a floor of such barn, and sloping towards such a drain as above referred to, whereby wash water discharged on the floor may be collected and disposed of through the drain;

(d) having multiple rest areas with individual stalls for each cow, but which is disposed at an elevation above the paved surface forming the floor, the stalls being dimensioned so that a cow can comfortably stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn;

(e) having adjacent or connected feeding areas with feeding troughs with means for discharging feed to the troughs;

(f) having a cow-holding area, a milking area, and a transfer area, all bottomed with the walking surface of the barn;

(g) having a means for washing the floor providing the walking surface in the barn where the said floor bottoms the feeding, holding, milking, and transfer areas, operable to send washwater flowing over the floor with such water washing any cow offal thereon into said drain means, which floor washing means includes means located over a region of the floor which is up-hill from said drain, and operable to disperse the water as a sheet of water over said floor;

(h) having a floor washing means comprised of a water supply disposed above the floor, and arranged whereby said water can be released to flow as a sheet of water thereon;

(i) having a floor washing means as referred to in statements above made, but comprised of a dam for damming and diverting water adjacent to the barn floor which dam is operable to send such water as a sheet over the floor toward said drain means, said drain means have all been used in the dairy industry in the United States for years prior to the year 1963. All of such things have been used prior to 1963 at such places as Weed, Lodi, and Bishop, California.

FURTHER, AFFIANT SAYETH NOT.

/s/ W. C. FAIRBANK
W. C. FAIRBANK

SUBSCRIBED AND SWORN to before me by the said W. C. Fairbanks on this 13th day of October 1969 to certify which, witness my hand and seal of office.

/s/ MARION L. MEAD
Notary Public In and for
Riverside County, California

(SEAL)



## EXHIBIT D

THE STATE OF TEXAS
COUNTY OF EL PASO

BEFORE ME, a Notary Public, in and for said County and State, on this day personally appeared BERNARD A. SAKRAIDA, who, having been by me first duly sworn, upon his oath deposed and said:

That he presently resides in El Paso County, Texas, and that he has been engaged for many years in the construction of dairy barns and dairy facilities in connection therewith. That growing out of his business and experience he has knowledge of the facts herein stated.

That a dairy barn for cows

(a) having a smooth, evenly contoured, paved surface as a floor, which provides a walking surface for cows in the dairy barn;

(b) having a drain as a means for draining wash water from an evenly contoured, paved surface, forming the floor of such barn, opening to the top of the floor;

(c) having an evenly contoured surface forming a floor of such barn, and sloping towards such a drain as above referred to, whereby wash water discharged on the floor may be collected and disposed of through the drain;

(d) having multiple rest areas with individual stalls for each cow, but which is disposed at an elevation above the paved surface forming the floor, the stalls being dimensioned so that a cow can comfortably stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn;

(e) having adjacent or connected feeding areas with feeding troughs with means for discharging feed to the troughs;

(f) having a cow-holding area, a milking area, and a transfer area, all bottomed with the walking surface of the barn;

(g) having a means for washing the floor providing the walking surface in the barn where the said floor bottoms the feeding, holding, milking, and transfer areas, operable to send wash-water flowing over the floor with such water washing any cow offal thereon into said drain means, which floor washing means includes means located over a region of the floor which is up-hill from said drain, and operable to disperse the water as a sheet of water over said floor;

(h) having a floor washing means comprised of a water supply disposed above the floor, and arranged whereby said water can be released to flow as a sheet of water thereon;

(i) having a floor washing means as referred to in statements above made, but comprised of a dam



for damming and diverting water adjacent to the barn floor, which dam is operable to send such water as a sheet over the floor toward said drain means;

have all been used in the dairy industry in the United States for years prior to the year 1963. All of such things have been used prior to 1963 at such places as Weed, Lodi, and Bishop, California; and

(j) That he has not collected water in a dump tank so arranged that it could be tipped, spilling the water out of it on to the floor, but that there is nothing new or novel about this, as it is merely the idea of tipping a tub to pour out the water, for which a simple mechanical arrangement would be necessary to tilt the tank;

(k) That a dairy floor-washing means comprised of a dam for damming and collecting water as a pool directly on the floor, with such dam being abruptly operable to send the water as a sheet over the floor toward the drain means is not new; nor is there anything new in the idea of the dam being comprised of a steel plate, hinged to a channel iron embedded in the floor, with a rubber seal around the edges, and held by a simple catch attached to a post. The steel plate is a simple plate, obtainable at any iron or steel works, and is already fabricated as a piece of steel plate, needing only to be cut to size. Nor is there anything new in it being hinged to a channel iron embedded in the floor, this being a simple construction long known to anyone in the construction business. Nor is there anything new

about holding it in place by a simple catch attached to a post. When the catch is released, the steel plate falls down, into a horizontal position, but this is like the movement of the tail gate on dump trucks in use more than 10 years ago and like the movement of the end gate on station wagons more than 10 years ago; and sealing the edges of the gate with a rubber trim is that like that used, among other places, around the edge of automobile doors, or doorframes, over a period extending back over a period in excess of 10 years from this date.

(l) Affiant further says the patent on which Plaintiff bases its cause of action is based essentially upon the idea of cleaning a dairy barn by washing it out with a flow of water which, in this instance, is caught behind a dam, which can be opened suddenly, sending the water cascading down the floor, and that this idea, and its use, are both ancient, and contain nothing new.

Further, Affiant sayeth not.

/s/ BERNARD A. SAKRAIDA
Bernard A. Sakraida

SUBSCRIBED and SWORN to before me by the said Bernard A. Sakraida on this 22nd day of October, 1969, to certify which witness my hand and seal of office
(SEAL)
/s/ BARBARA J. ARNETT
Notary Public — In and for
El Paso County, Texas.



## EXHIBIT E

THE STATE OF OREGON
COUNTY OF JACKSON

BEFORE ME, a Notary Public, in and for said County and State, on this day personally appeared Archie Sharp, who, having been by me first duly sworn, upon his oath deposed and said:

That he resides in Jackson County, Oregon, and that he has been conversant with the dairy business in the western part of the United States, and particularly on the Pacific coast for more than 10 years; and that he has personal knowledge of the facts hereinafter set out.

That a dairy barn for cows

(a) having a smooth, evenly contoured, paved surface as a floor, which provides a walking surface for cows in the dairy barn;

(b) having a drain as a means for draining wash water from an evenly contoured, paved surface, forming the floor of such barn, opening to the top of the floor;

(c) having an evenly contoured surface forming a floor of such barn, and sloping towards such a drain as above referred to, whereby wash water discharged on the floor may be collected and disposed of through the drain;

(d) having multiple rest areas with individual stalls for each cow, but which is disposed at an elevation above the paved surface forming the floor, the stalls being dimensioned so that a cow can comfortabley stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn:

(e) having adjacent or connected feeding areas with feeding troughs with means for discharging feed to the troughs;

(f) having a cow-holding area, a milking area, and a transfer area, all bottomed with the walking surface of the barn;

(g) having a means for washing the floor providing the walking surface in the barn where the said floor bottoms the feeding, holding, milking, and transfer areas, operable to send washwater flowing over the floor with such water washing any cow offal thereon into said drain means, which floor washing means includes means located over a region of the floor which is up-hill from said drain, and operable to disperse the water as a sheet of water over said floor;

(h) having a floor washing means comprised of a water supply disposed above the floor, and arranged whereby said water can be released to flow as a sheet of water thereon;

(i) having a floor washing means as referred to in statements above made, but comprised of a dam



for daming and diverting water adjacent to the barn floor, which dam is operable to send such water as a sheet over the floor toward said drain means;

having all been used in the dairy industry in the United States for years prior to the year 1960. All of such things have been used prior to 1960 at such places as Weed, Lodi, and Bishop, California; and

(j) That a dairy floor-washing means comprised of a dam for damming and collecting water as a pool directly on the floor with such dam being abruptly operable to send the water as a sheet over the floor toward the drain means is not new; nor is there anything new in the idea of the dam being comprised of a steel plate, hinged to a channel iron embedded in the floor, with a rubber seal around the edges, and held by a simple catch attached to a post. The steel plate is a simple plate, obtainable at any iron or steel works, and is already fabricated as a piece of steel plate, needing only to be cut to size. Nor is there anything new in it being hinged to a channel iron embedded in the floor, this being a simple construction long known to anyone in the construction business. Nor is there anything new about holding it in place by a simple catch attached to a post. When the catch is released, the steel plate falls down, into a horizontal position, but this is like the movement of the tail gate on dump trucks in use more than 10 years ago and like the movement of the end gate on station wagons more than 10 years ago; and sealing the edges of the gate with a rubber trim is that like that

used, among other places, around the edge of automobile doors, or doorframes, over a period extending back over a period in excess of 10 years from this date.

Further, Affiant sayeth not.

/s/ ARCHIE SHARP
Archie Sharp

SUBSCRIBED AND SWORN TO before me by the said Archie Sharp on this 30th day of October, 1969 to certify which witness my hand and seal of office.

/s/ RONALD M. JAMES
Notary Public — In and for
(SEAL) Jackson County, Oregon

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[23] JUDGMENT

[Title Omitted in Printing]

Filed: Feb. 19, 1970

Defendant's Motion for Summary Judgment having come on regularly to be heard by the Court on December 22, 1969, with, at the request of Plaintiff, further arguments and consideration thereof on February 11, 1970, and both Plaintiff and Defendant having appeared by their respective attorneys of record, and the Court having fully heard and considered Defendant's Motion for Summary Judgment, and the arguments of counsel with reference thereto, finds:

1. Plaintiff's patent is a combination patent, composed of a number of parts or elements, as set out in said patent.



2. The several component parts or elements of said patent were well known in the dairy business long prior to the date of filing the original application for this patent.

3. Plaintiff, in a "Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment" stated it does not deny the patent is made up of a combination of old elements, and further stated it admits all the elements are individually old.

4. The combination of said old elements did not result in anything new and patentable.

5. This case is controlled by the holding and opinion of the Supreme Court of the United States in *Anderson's-Black Rock, Inc. vs. Pavement Salvage Co., Inc.*, opinion dated December 8, 1969.

6. There is no issue as to any material fact.

7. Defendant's Motion for Summary Judgment is well taken, and is granted.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that Defendant's Motion for Summary Judgment be and it is hereby granted, and further, that Plaintiff take nothing by this its action and Judgment is hereby rendered in favor of the Defendant. It is further ORDERED that Defendant have his costs herein expended.

ENTERED this 19th day of February, 1970.

/s/ ERNEST GUINN
JUDGE

[39] FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Title Omitted in Printing]

Filed: Sep. 23, 1971

## FINDINGS OF FACT

1. I find that the "dairy establishment as described in United States Letters Patent 3,223,070 is composed of 13 separate items, as follows:

(a) ". . . a smooth, evenly contoured, paved surface forming a floor providing a walking surface. . ."

(b) ". . . drain means for draining wash water from such floor opening to the top of the floor".

(c) ". . . said smooth, evenly contoured surface which forms such floor sloping toward said drain. . ."

(d) ". . . multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also a smooth pavement. . .".

(e) ". . . which is disposed at an elevation above the paved surface forming the floor. . ."

(f) ". . . said stalls being dimensioned so that a cow can comfortably stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn. . ."

(g) ". . . said barn further including defined feeding areas having feeding troughs. . ."



(h) ". . . a cow-holding area".

(i) ". . . a milking area."

(j) ". . . a transfer area all bottomed with the walking surface forming said floor in the barn. . ."

(k) ". . . and floor washing means for washing the floor providing the walking surface in the barn where said floor bottom, said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into the said drain means, said floor washing means including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over said floor."

(l) A tank on a mounting, so that it can be tilted, and the water poured out to cascade on the floor to form a sheet.

(m) A floor-washing means comprising a dam for damming or collecting water as a pool directly on the floor, which such dam abruptly openable to send water cascading as a sheet over the floor towards the drain.

2. I further find that each of the items above-described were not new, but had been used in the dairy business prior to the time the application for the said Gribble patent, made the subject of this action, had been filed in the Patent Office of the United States on

November 5, 1963. This finding is based upon the testimony of Robert B. Price, and upon the following facts in evidence, the first group being taken *from the deposition of Donald Joseph Gribble*, to whom the said patent was issued, and who is now president of AG PRO, INC., to-wit:

(a) He described the, "smooth, evenly contoured paved surface forming a floor providing a walking surface" as having to do with the shape of the top surface of the floor, and that, "we use a small amount of crown, generally", and said, "the contour, as I would interpret it, is the general shape of the surface of the floor."

(b) With respect to the clause, ". . . drain means for draining wash water from such floor opening to the top of the floor", he said, "It can be a graded ditch or a ditch with — arranged like a scuffer, or a ditch covered with a steel door that can be opened to collect the drainage". To the question, "The drain is actually a ditch, isn't it?", he answered, "Yes."

(c) With respect to the clause, "said smooth, contoured surface which forms a floor sloping toward said drain," he admitted this was simply a floor with a small amount of crown sloping toward a ditch.

(d) With respect to the clause, "multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also a smooth pavement", he was asked, "And that's similar to dairy stalls in general, is it not?", to which he answered, "Yes."



(e) With respect to the clause, "which is disposed at an elevation above the paved surface forming the floor", his response was that this was typical dairy construction.

(f) With respect to the clause that, "said stalls being dimensioned so that a cow can comfortably lie or stand in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn," he admitted this is, "typical dairy construction" as to which there are "variations" from one installation to another. He further stated that a lot of this is description which has been common in the dairy business for a long time, but which Gribble included because it was conceived as being necessary to frame the "flush concept".

(g) With respect to the clause, "said barn further including defined feeding areas having feeding troughs", he agreed this is typical dairy construction, and has been used over a long period of time.

(h) With respect to the phrase, "a cow-holding area", he agreed this is typical dairy construction and has been used over a long period of time.

(i) With respect to the phrase, "a milking area", he agreed that dairy barns have always had milking areas.

(j) With respect to the clause, "a transfer area all bottomed with the walking surface forming said floor in the barn", he agreed that dairy barns have generally always had transfer areas.

(k) With respect to the provision that floor washing means for washing the floor providing the walking surface in the barn where said floor bottom, said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into the said drain means, said floor washing means including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over the floor, he said this means that the various areas (i.e., cow-holding areas, milking areas, transfer area) are joined together so that the water, as it flows down, will move in a uniform sheet and carry all the waste material to the drain means.

(l) Paragraph 2 of this part of the patent merely describes a tank on a mounting, so that it can be tilted, and the water poured out to cascade on the floor to form a sheet. Mr. Gribble said this was not like dumping a tub of water out because of the volumes involved and the means of doing it. However, it is an old idea to put water into a tub, vat or tank which is mounted so that it can be tipped and the water poured out.

(m) The reference to a floor washing means comprising a dam for damming or collecting water as a pool directly on the floor, with such dam abruptly openable to send water cascading as a sheet over the floor towards the drain — Mr. Gribble was asked if that means you have a place that holds water that you can dump out on the floor and it flows down the floor, isn't



that all, to which he replied, "Yes, very rapidly. There are several variations of that tank," and with respect to the item listed under (m) above, he was asked if this did not mean that instead of putting the water in the tub, you have it behind a dam where the doors will open and let it go right on down quick, to which he answered, "Yes, right". He was then asked, "And that's really the gist of the whole thing, isn't it?" to which he answered, "It's the basic concept of manure flush, yes."

3. I find that in Plaintiff's supplemental memorandum in opposition to Defendant's motion for summary judgment filed in this court on the ____ day of January, 1970, it is stated on behalf of Plaintiff:

> "Plaintiff doesn't deny that the patent is made up of a combination of old elements, just like most other patents." (Page 8).

In the same memorandum, it is said:

> "Plaintiff admits that all elements are individually old, but no one prior to the inventors ever combined the elements as called for in the claims."

4. I further find that many of the items going to make up Plaintiff's claim for a patent were disclosed in prior patents, known respectively as the McCornack patent, the Holz patent, the Ingraham patent, the Kreutzer patent, the Bogert patent, and the Luks patent; and that the statements of the Examiner's opinions refusing to issue a patent are true as to all items

there stated to be covered in prior patents or publications.

5. I therefore find as a fact that each and all of the component parts of this patent as listed under the applicant's claims set out in said patent, were old and well-known throughout the dairy industry long prior to the date of the filing of the application for the Gribble patent. I further find that what Mr. Gribble referred to in his deposition as the essence of the patent, to-wit, the manure flush system, was old, various means for flushing manure from dairy barns having been used long before the filing of the application for the Gribble patent, the general idea in that connection being a hard surfaced sloping floor onto which the cows' offal was dropped, and some system of introducing water in sufficient quantities and force onto said floor to wash the offal therefrom, with a ditch or drain to carry the offal so washed away from the barn, either into a manure container or otherwise.

6. I further find that the use of a tank at the upper end of the floor to hold water, which can be suddenly released onto the floor of the dairy barn, is a relatively simple matter. Steel or concrete tanks have been used prior to 1963 as water troughs on dairies. Neither the tank which holds the water, nor the means of releasing the water quickly is new, but embrace tanks and doors which have long been known, and their use in this connection is one that is obvious, and the patent in that respect is lacking in novelty. The patent does not meet the non-obvious requirements of the law.



## CONCLUSIONS OF LAW

I find that the decision in this case is controlled by the opinion of the United States Supreme Court in *Anderson's Black Rock, Inc. vs. Pavement Salvage Co., Inc.*, 396 U.S. 57, 24 L.Ed.2d 258. The same finding made by the Supreme Court in that case are applicable here, and changed to fit the circumstances of this case are:

(1) Each of the elements combined in the patent was known in the prior art. It is urged that the distinctive feature of the patent was the tank at the upper end of the dairy barn floor which held the water that could be cascaded onto the floor. However, the making of such a tank, with a door or gate openable in the manner this one was, would not of itself have been patentable. This brings us to the question whether the combination of old elements created a valid combination patent.

(2) All that the Plaintiff has done is to construct several elements known in the prior art in a sequence known in a dairy barn. This may be relevant to commercial success, but not to invention.

(3) The question of invention must turn on whether the combination supplied the key requirement. I conclude that the combination was reasonably obvious to one with ordinary skill in the art. The convenience of putting a tank for water at the upper end of the dairy barn floor, together with the other elements and areas in the dairy barn, though perhaps a satisfactory way of washing the dairy barn floor, did not produce a "new or different function".

(4) A combination of elements may result in an effect greater than the sum of the several effects taken separately but even if the combination here filled a long-felt want and it has enjoyed commercial success, those matters, without invention, will not make patentability.

(5) The patent standard is basically constitutional. Article I, Section 8 of the Constitution . . . that under that power Congress may not "enlarge the patent monopoly without regard to the innovation, advancement, or social benefit gained thereby." Moreover, Congress may not authorize the issuance of patents whose effects are to remove existant knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command, "must promote the progress of useful arts." This is the standard expressed in the Constitution, and it may not be ignored.

(6) I conclude that while the combination of old elements may have performed a useful function, it added nothing to the nature and quality of dairy barns theretofore used. I further conclude that to those skilled in the art, the use of the old elements in combination was not an invention by the obvious — non-obvious standard. Even though the dairy barn in question attains the posture of a successful venture, more than that is needed for invention.

I further find that the decision in this case is supported by the opinion of the Court of Appeals, Fifth



Circuit, in *Inject-o-Meter Mfg. Co. vs. North Plains Fertilizer & Co., Inc.*, 439 F.2d 1138 (1971), with special reference to what is there said about novelty and non-obviousness.

SIGNED AND ENTERED this 23 day of September, 1971.

/s/ ERNEST GUINN
JUDGE

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[40] FINAL JUDGMENT

[Title Omitted in Printing]

Filed: Sep. 23, 1971

The above styled and numbered action, having come on regularly to be heard on the 13th day of September, 1971, and the respective parties having appeared in person or through their duly constituted officials, and through their respective attorneys of record, and the Court having heard the pleadings, evidence, and argument of counsel, is of the opinion and finds that said Patent No. 3,223,070 held by Plaintiff does not constitute invention, is not patentable, and is not a valid patent, it being a combination patent, all of the elements of which are old in the dairy business, long prior to 1963, and the combination of them as described in the said patent being neither new nor meeting the test of non-obviousness, Defendant is entitled to judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Patent No. 3,223,070, does not constitute invention, is not patentable, and is not a valid patent;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Plaintiff, AG PRO, INC., take nothing by its action against BERNARD A. SAKRAIDA, the Defendant herein, and that judgment be and it is hereby rendered in favor of Defendant, BERNARD A. SAKRAIDA;

IT IS FURTHER ORDERED that the costs herein be taxed against the Plaintiff, for which Defendant may have his writ of execution.

SIGNED AND ENTERED this 23 day of September, 1971.

/s/ ERNEST GUINN
JUDGE

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[42] TRANSCRIPT OF PROCEEDINGS

[Title Omitted in Printing]

Filed: Dec. 29, 1971

[3] BE IT REMEMBERED that on the 13th day of September, 1971, the above entitled and numbered cause came on for hearing before the Honorable Ernest Guinn, Judge of said Court:



WHEREUPON the following proceedings were had, to-wit:

THE COURT:
Gentlemen have you all discussed the procedure you would like to follow today? The Court feels the evidence that was received before the hearing could be considered as being admitted in this trial and then each party may supplement it by any additional evidence they wish to present.

MR. KOLISCH:
That is satisfactory with the plaintiff.

MR. HULSE:
It is satisfactory to us.

* * * *

[6] MR. KOLISCH:
. . . We will show that a problem had existed for literally thousands of years. As the Court knows, this goes back to the time of Hercules. It was his fifth task to wash the Augean stables. . .

* * * *

[9] DONALD JOSEPH GRIBBLE
having been first duly sworn on oath to tell the truth, the whole [10] truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. KOLISCH:

Q Please state your name and address.

A Donald Joseph Gribble, Hixson, Tennessee.

Q What is your occupation, Mr. Gribble?

A I am an engineer.

Q What is your present position in connection with the plaintiff?

A I am the President of the Ag Pro Corporation and I work under the title of Director of Engineering.

Q Does Ag Pro, the plaintiff in this case own the patent in suit, the Gribble invented patent?

A Yes, the patents were assigned to Ag Pro.

Q Does Ag Pro own the right, also, to bring this suit for patent infringement?

A Yes. I am not qualified to say legally but they have all rights to the patent.

Q They own all the rights?

A Yes.

Q As well as all rights to enforce it, is that correct?

A Yes.

Q Now you are the co-inventor of the patent in suit, isn't that correct?

A Yes.

Q Will you give us, briefly, your educational background?

[11] A I have a degree in agricultural engineering from Oregon State University.

Q When did you obtain that?

A In 1957.

Q And give us your business experience.

A Well, I was born and raised on a dairy, if you want to go back that far, and after college and com-



pleting a three session in the service I went to work with my father in a company called the Gribble Construction Company in Port Arther, Oregon which later evolved into Ag Pro Corporation. Since that time I have acted in an engineering capacity and a management capacity for Ag Pro Corporation.

Q Will you relate to us as fully as you can what the circumstances were surrounding your making the invention in suit? In other words take us back to the time you first started on this.

A We began construction of the Sweet (PHONETIC) Dairy in Oregon in the spring of 1961 and this is the first dairy where we utilized the flush system as it is described in our patents. Gribble Construction Company acted as the general contractors-builders. We intended, initially, to experiment with hydraulic methods of waste removal but nothing specific. After the dairy was completed or the first half of it was completed the cows were moved in and we began these experiments which consisted of cleaning in conventional ways with high pressure hoses. We tried —

Q — let me interrupt you for a minute. As of that time [12] — you are now talking about 1961-'62?

A Yes.

Q What were the best conventional means that you knew of for cleaning dairy floors at that time?

A Well, tractor scraping and hosing has, for many years, been the standard accepted way to clean dairies.

Q All right. Continue with your experiments.

A The experiments consisted of high pressure hosing with relatively high volumes. Work with permanently fixed sprinkler systems similar to lawn sprinklers where the individual sprinklers were

strategically located to try to clean up areas of the floor, and then the use of fairly high volume flow rates from an irrigation pump where we introduced pipe to have a distribution of 500 to 600 gallons per minute on the floor and the system that is covered by the patent which introduces dams and reservoirs in the process to obtain a surge or tidal wave effect. As a result of the — of these four wasys we experimented with, the surge or tidal wave type of system evolved as much more efficient than any of the others in terms of time required to get the cleaning done, total volume of water used and labor and in initial investment. It was a very simple device to install as opposed to piping and valving required for say, the sprinkler system or the big volume pumps and system required for the high-flow rate irrigation type of a system.

Q And approximately what date had you completed your experiments and had you stopped testing it and were satisfied [13] that you had an operatable system which would be made available to people who wanted to purchase it?

A We had a pilot model, definitely better than any of the other things we were working with, in the spring or early summer of 1962.

Q And then you — you had this pilot model — this is the one at Sixes, Oregon?

A Yes.

Q That finally proved out and then what did you do?

A We proceeded with the second half of the construction of the dairy and installed this sytem in the entire dairy.

Q And tell us about the initial reception which you had when you tried to present this to dairymen prior to your having built the successful pilot model?



A Well, most people didn't think it would work. It seemed too unbelievable, and this is still the reaction. If we describe this same thing verbally to a dairymen who has not seen or even if we show pictures and slides of it being done, it is difficult for them to believe the kind of a job that it is possible to obtain. This system, when it is properly laid out will literally clean up thousands and thousands of square feet of floor area with virtually zero labor, in just a few minutes — actually just a few seconds.

Q After you had completed the first successful installation was this then shown to other dairymen for the purposes of [14] selling systems?

A The first sale of the system was made in the spring of 1963 to the Pineyhill-West Dairy.

Q This is in California?

A Yes, in California.

Q And tell us now about the reception by the dairy industry of your patented system?

A Very enthusiastic. As a result of this early work and the formation of Ag Pro we have built a business that is based on consultation and services to the dairy industry where we specialize in a design and lay-out of large commercial dairy facilities. We have worked all over the United States, now, in this capacity in the nine years since that time and have seventy some odd installations that we have designed and installed of this type. We have worked outside of the United States in Japan and Hawaii. We have installed systems for various of the educational institutions including Oregon State College, the University of New Mexico at Las Cruces, the University of North Carolina at Raleigh and we have a system under construction at the University of Georgia at Athens.

Q And just by way of example, can you give us the name of some of your licensees?

A Well, the licensees include Dawn Dairy in California, the Ralston Purina Company of St. Louis, the Dean Foods Company of Rockford, Illinois and many many others. There is 60 or 70 of them.

Q And roughly what are the size of these operations and [15] the number of cows or however you measure this type of operation?

A Well, the trend in the dairy industry is toward larger and larger units and of course we specialize in working with large commercial dairies so I would say the range would be from perhaps 200 cows to 2,000 cows.

Q Would you tell us what your standard licensing fee is? Do you have a license program and what is it?

A Yes. The standard fee is $1,500 for the facility plus $1.00 per cow of the basic design.

Q And how — have you granted this license to anyone who wanted it? In other words has this been made avilable to those who wished it?

A Yes, anyone.

Q I will hand you a roadmap with certain indications on it. I will ask you to identify this — would you mark it as plaintiff's exhibit one?

(Whereupon Plaintiff's Exhibit One was marked for Identification)

Q Can you identify that?

A This mpa indicates the location of the various dairies that I and my associates have worked on in a design capacity in the last nine years since the formation of Ag Pro, which have been issued licenses.



Q You have marked those yourself in there in accordance [16] —

A — yes. Mr. Kolisch, one other point I should make is that since the time this Court ruled against us in the previous hearing we have refrained from seeking any legal action against anyone else and in some cases some of these should be licensed.

Q But these are all installations in accordance with your patent?

A Yes, and installations I worked on. It does not include installations that other people built outside.

Q They are all installations under which you — that is, Ag Pro installed —

A — yes.

Q Or built?

A Yes.

Q Or designed?

A Yes.

Q How well do you know Mr. Sakraida, the defendant — excuse me, I will offer plaintiff's exhibit one.

THE COURT:

All right, It will be admitted.

Q How long have you known the defendant, Mr. Sakraida?

A My first contact with Mr. Sakraida was on the Dawn Dairy job at Bakersfield, California and this began early in 1966.

Q In what capacity was he involved in that job?

A He was the general contractor for the construction of that dairy which is a 1,300 cow dairy operation.

[17] Q And what was your connection with that job?

A I was the designer of the dairy and supplied the plans and construction details.

Q Specifically directing your attention to the patented manure flush system, what type of information did you make available to Mr. Sakraida in connection with the Dawn Dairy job?

A Well, we made all of the information concerning the patent, plus the data we had gathered on volume, slopes, data that doesn't appear in the patent but is required for proper operation of the system. We supplied shop drawings and construction drawings for the various pieces of equipment that were involved, such as the water dams.

Q I am going to show you some copies of letters and ask you to identify them.

A Plaintiff's exhibit two, a letter dated May 19, 1965 addressed to Ag Pro from Charles Shoemaker of Dawn Dairy.

Plaintiff's exhibit three is a letter dated March 16, 1966 from Charles Shoemaker of Dawn Dairy to Ag Pro.

Plaintiff's exhibit four, a letter dated April 4, 1966 from Joe Gribble to Charles Shoemaker, Dawn Dairy.

Plaintiff's exhibit five, a letter dated July 9, 1966 from Joe Gribble to Bud Sakraida, Western States Construction Company with attached drawings.

Q Would you look at these exhibits two, three, four and five?

[18] A These are zerox copies of letters from the Ag Pro files and they describe the circumstances leading up to the commissioning of us to design the Dawn Dairy and working with Mr. Sakraida and delivering certain plans and drawings to him.

Q In connection with exhibit five, there is a penciled notation at the end of the letter. Will you read it and tell us who put it there and what it refers to?



A There is a note at the bottom, "These units were subsequently supplied by Ag Pro. The drawings were never returned." And it is initially by me, D. J. G. It refers to the water dams and paraphernalia for the flush system as described on these drawings. We supplied the Dawn Dairy and Mr. Sakraida these drawings to construct these items but they elected, during the course of construction, not to build them but to buy them from Ag Pro and we subsequently supplied the water dams and paraphernalia for the flush system.

Q Are you familiar with the Jessup Dairy in Bakersfield, California?

A Yes.

Q Will you tell us, with respect to this lawsuit, what your knowledge is of the Jessup Dairy?

A Well, the Jessup Dairy is similar to the Dawn Dairy in that it has housing areas and feeding areas and holding areas for the cattle and it contains a manure flush clean up system that is substantially identical to that of the Dawn Dairy.

[19] Q What were the circumstances surrounding the construction of the Jessup Dairy, and particularly I would like for you to tell me what you know as far as Mr. Sakraida's involvement with Jessup.

A Mr. Sakraida, through a friend of his, Mr. Al Gandt supplied the drawings and plans for the Jessup Dairy and Mr. Sakraida subsequently acted as the general contractor in the construction of the Jessup Dairy.

* * * *

[26] MR. KOLISCH:

We also have these two publications, plaintiff's exhibit seven, the article in Western Dairy Journal.

THE COURT:

What is the purpose of those?

MR. KOLISCH:

Those are to show commercial acceptance of the invention. In other words these are publications in the industry.

THE COURT:

All right. Mr. Hulse?

MR. HULSE:

If the Court please, we object to those; those [27] are magazine articles, insofar as they contain any statement of fact, they are hearsay as far as this defendant is concerned. Insofar as they express an opinion or trying to offer an opinion of somebody who is not here, who cannot testify —

THE COURT:

— I am inclined to think so. I will reserve my ruling and Mr. Gribble can testify to any of that that he knows of his own knowledge. I will reserve my ruling on that. If he wants to — if he wants to verify any of it he can. He can do that, but as to people not here to be examined, and their opinions, we will see. Go ahead.

MR. KOLISCH:

Your Honor, these are being offered merely to show there were articles written about the installation in



recognized magazines which have a circulation throughout the area and I will —

THE COURT:

— I think you can testify to that and offer that without the content; that they were written up. I don't think there is any question about that, that they were written up in detail in these magazine articles of those dates but there wouldn't be anything in there that would be binding on the defendant and — he wouldn't have an opportunity to question him on it. The Court will allow you to state these articles about your patent and we will let it go at that for the time being.

MR. KOLISCH:

Let the record show that the plaintiff has offered as exhibit seven an article in Western Dairy Journal entitled "The Way You'll Milk Tomorrow and The Way You'll Clean Up" dated [28] May, 1964. Perhaps I can ask him a couple of questions?

THE COURT:

All right, do that.

Q (MR. KOLISCH) Are you familiar with the article in plaintiff's exhibit seven?

A Yes.

Q Is that article about the patent manure flush system?

A Yes, the second half of the article, "And The Way You'll Clean Up" — the second half of this refers specifically to the patented system and the installation at the Pinyhill-West Dairy in Calistoga, California.

Q And this magazine "Western Dairy Journal", to your knowledge what is its distribution?

A Its primary distribution is in three western states, Oregon, Washington and California, although progressive dairymen in other states do subscribe to the magazine.

MR. KOLISCH:
I will renew my offer.

THE COURT:
All right. Do you want to examine him about the second one?

Q (MR. KOLISCH) In "Dairymen", September, 1967, is there an article in there about the patented system?

A Yes, the cover sheet on this particular publication has pictures of the manure flush system in operation and on pages 12 and 13 there is a feature article, the title of which is "Biltmore Farms Solve Labor Problems With Automation", and the sub-title, "Flush System in Action".

[29] Q What dairy is being described in this article?

A This is the Biltmore Farms Dairy at Asheville, North Carolina.

Q Do you know what the distribution of "The Sunbelt Dairymen" is?

A "The Sunbelt Dairymen" is distributed in the southern states from Texas to the east coast.

Q Do you know what the circumstances were surrounding the preparation of these articles in these two magazines? How did this come about?

A The Biltmore Dairy was — represented quite a new and different way of handling the cows and cleaning up the waste for the dairy and as a consequence there was an article written on it.



Q What about "The Western Dairy Journal"?

A The same thing. Pinyhill-West Dairy represented a new departure from conventional ways of handling cattle and cleaning up waste, as indicated in the title, "The Way You'll Milk Tomorrow . . ." and the article was written about it.

MR. KOLISCH:
Your Honor I would now like to show a movie which will be not more than about 10 or 12 minutes.

THE COURT:
Mr. Carney, will you turn the lights off?

Q When you are ready to go, generally explain to the Court what you are going to show and then, as we go along you can explain it.

[30] A This short film describes the conditional ways of cleaning up manure in dairy barns and other animal facilities but specifically related to dairy barns in this case. It was taken at the Hall Brothers Dairy in Montgomery. A portion was taken at Reliance Dairy in Bakersfield, California, a dairy similar in size, I believe, 1,500 or 1,600 cows.

Q Now the first portion will be with respect to the standard, usual ways of cleaning up?

A Yes, the first-half of the film shows shovel work and work with the scoopmobiles and manure spreaders or trucks and conventional ways of handling manure which still are conventional. This film, this part of the film strip was taken just a few days ago, 10 days ago.

THE COURT:
All right.

A The second part refers specifically to our manure flush system and was taken at the Hall Brothers installation, which is a recent installation and shows quite graphically the results we get.

THE COURT:

All right.

A This boy is preparing to do some shovel work. The normal ways of handling manure at the time of our invention were working with shovels or brooms of this type and using high pressure hoses, using tractors to scrape with or in some cases mechanical barn cleaners, although in big days of this type mechanical barn cleaners never worked out well at all. An interesting feature here [31] is that necessity of getting the cows out of the way to do the cleaning, if you are cleaning in this way. It is a very tedious and time consuming job. This photo now was taken at Reliance Dairies near Delano, California. This shows a large truck in the background, the manure being handled in dry form or simply dried. This big scoopmobile is used to clean up the floors where the cows eat and sleep. In this large area this equipment is used full-time in manure clean up and manure handling. A machine of the type of this scoopmobile would rent for something like $20.00 an hour. Again, illustrating a very slow and tedious and time consuming job to handle the waste and manure from the dairy. A truck would haul the accumulated waste out to a field and stock pile it or it would be distributed in manure spreaders.

Now we are in the main dairy building and this is a relatively new and modern dairy. This is in the milking room — not the machine room but the milktank room and here you are in one of the milking areas. This



is a boy in the left hand corner hosing this parlor down. This is very tedious and time consuming. To clean up one of these parlors properly would require approximately an hour and a half. The hose the boy is using is very high volume and high pressure and would probably be dispensing something like 30 to 40 gallons per minute. In an hour this would represent perhaps 2,000 gallons of water. It is very tedious and slow work. Notice also where the hose strikes the ground you get a good cleaning action but a few feet away from the hose, where the low volume water [32] is running on the ground you don't have much cleaning. The boy literally spent hours at this task which has to be done twice daily in a typical dairy.

Q Mr. Gribble, do they use these hoses in the other portions of the dairy? You showed earlier where they were using the scoopmobile?

A Generally speaking, no. The hoses would be used only in the milking area and cow housing or holding area adjacent. This is due to sanitary requirements.

We are now at Hall Brothers Dairy near Montgomery, Alabama. This is a 1,200 cattle layout designed to be flushed cleaned in its entirety, including the milking parlors, holding area, housing area, feeding area and transfer lanes. This is a picture of the parlor. There is a girl in there milking and you will see her in the lower left hand corner. The girl is about to wash the milking parlor with these flush tanks of our design. She has just released the flush tanks and it is washing that side of the parlor and in a moment she will release the other tank. The girl has just released 600 gallons of water to do approximately the same job the boy in the other picture was doing which required

many minutes. The girl didn't even leave the pit or stop milking to accomplish this clean up job. All of the water from the parlor flush clean up and from the hose that the girl had in her hand is accumulated on the floor of the holding pen behind this hinged steel water dam located at the rear. This accumulated water will be used a little later to clean up [33] the housing and feeding area. Understand that this is waste water that has already been used one time. This shows a general view from the rear of the holding pen forward towards the parlors. The floor slopes in this direction so all of the flush water ends up contained in this tank behind the hinged steel water dam that that cow is standing by. This crowding device here moves the cows forward as the holding area fills with water so they don't stand in the accumulated waste water. This shows a general view of the housing and feeding area and this shows the stations where the cows rest. Coming on around it shows one of the lanes with an accumulation of waste on the floor in a feeding building. Here again is a general shot showing the transfer lanes. Now this milking operator is coming down to get his next group of cows. This is a 100 cow group. He opens this gate. Notice the gate has a steel plate along the base which will divert the fresh water down this particular lane. You can see the accumulated waste on the floor. The cows are waiting in the transfer lane to go into the milking parlor. This is a shot of the low end of the cow housing and feeding lane and it shows the accumulation where the flush water is collecting. This steel plate is over a ditch. The steel plate can be raised or lowered to allow cows to pass over it. This shot is taken from the low end of the cow housing and feeding area looking up hill. These are shots of the dirty lane



and you can see the manure on the floor. Again, there is quite an accumulation of manure on the floor and that cow is adding to it right there.

[34] This is a general view of one of the cows in the lane. Now the accumulated waste water is being released to accomplish the flush and the clean up is complete. The advancing face of this surge of water is able to dislodge and carry the waste water along a great distance, several hundred feet. An interesting point there is the ability of this system to clean up with the cows in place. You notice it is washing right around their feet. The water that follows the initial abrupt release gets the floor quite clean. There is literally one hundred per cent removal of the waste and the debris from the floors when these systems are layed out properly, in terms of grade and slope and volumes of water. The alley we are looking down is approximately 400 feet long and will average four feet wide, and this alley was cleaned up literally in the time we watched this film; not more than one or two minutes. There are no scoopmobiles involved in the job; no boys walking around for hours at a time with hoses. The system is relatively inexpensive to install and requires only the proper grade and installation. The system is quite conservative of water in that it reuses already wasted water. That is the end of the film.

MR. KOLISCH:

I will offer this film as plaintiff's exhibit nine.

THE COURT:

All right.

Q (MR. KOLISCH) With respect to that last show-

ing of the cleaning which you said took a matter of what, a couple of minutes to clean this alley?

[35] A Yes.

Q Do you have any estimates from your experience as to how long it would take to do a comparable job with the known methods of cleaning barn floors?

A Well, most people would not do a comparable job because that would involve hosing after the scraping. A feature of our system is the extreme cleanliness we are able to maintain. Generally the housing and feeding areas shown in the last portions of the reel would be only tractor scraped, which leaves a thin film of deposited waste on the floor, and to get a comparable job you would have to tractor scrape, followed by hosing, which would be a very long and tedious job. I would say four or five hours of work would be involved to clean up a comparable area in a like manner.

* * * *

[37] CROSS EXAMINATION

BY MR. HULSE:

Q Mr. Gribble, your counsel went down each clause of claim one of your patent with you and asked you if each one of those elements as described there were not to be found in the Jessup Dairy at Bakersfield, California and I believed you answered each one of them is to be found there.

A Yes, sir.

Q And do you claim that you have a patent on each one of those elements that are listed there in claim one of this patent?



A No, sir. The patent hinges around the manure flush system and its equipment.

Q Each one of those elements of the flush system is old in the dairy business, long before 1963, wasn't it?

A Yes, sir.

Q And you so answered when I took your deposition some time last year. That is true, isn't it?

A Yes, but I hate to make a blanket statement for every- [38] thing.

Q I am talking about each and every one of those elements as described in claim one until you get down to where you talk about the nature of the flush system — until you get down talking about a pool and dam, everything else before that is old, isn't it?

A Yes, sir, descriptive literature to frame the patent system.

Q And you don't claim that because they have these holding pens and rest pens and the place where the cows stand while she is being milked and all that sort of thing, you don't claim you have a patent on that that gives you any exclusive rights to those, do you?

A No sir but they are essential just to frame the situation. The cow is essential to produce the waste to be cleaned up.

Q And the great problem in the dairy business about getting rid of manure if they use any kind of a flush system is the disposal, not only of the manure but of the water, isn't it?

A Yes, but this is true of any system.

Q I say, whenever you use water that is one of the big problems, is disposing of the water, isn't it?

A Yes, sir.

Q And that is one of the problems of the system where you use a tank that holds a certain amount of water?

These tanks on dairies you built, what do they hold, 2,000 gallons?

[39] A It varies with the design requirements.

Q And the size of the dairy?

A Right.

Q And — what size tanks have you built, by gallons?

A From 300 to 4,000 or 5,000 gallons.

* * * *

[41] Q This matter of washing off dairy barn floors is old in the dairy business, is it not?

A Using hoses and those methods are.

Q They have used the hose system, have they not?

A Yes.

Q They have used it where it drains from a tank or someplace by the means of pipes, have they not?

A Pipes and valves to introduce water in spray form, you mean?

Q Either in quantities or in sprays, they have done it [42] both ways?

A Yes, with the pipes.

Q They have done it by spray or shower systems?

A Sprinklers, yes.

Q They have done it by introducing water onto the floor of the dairy barn from a nearby creek or some other river or whatever they had handy, have they not?

A I suppose. I am not familiar with that.

Q Have you not seen any of those in operation where they have been used?

A Where a creek was diverted into a dairy barn?

Q Yes.



A No.

Q You have heard of it?

A Just now.

Q Your counsel just now mentioned Hercules this morning back in Greek mythology?

A Sir, I don't go to church as often as my counsel.

Q I see. Anyway you heard of that?

A Yes.

Q And the only thing about this patent you claim here is you have a group of things that are all old in the business except when you come down to how the water is introduced into the floor of the dairy barn and it is the method of introducing the water to the floor of the dairy barn that you claim to be unique, [43] is it not?

A It is one of the key elements of our patented system, yes.

Q And — but it is true that water has been introduced to the floor of the dairy barn to wash them off by various and sundry means over many years, back long prior to 1963?

A Yes.

Q You suggested out there the use of pipe, did you not?

A Not at Dawn. In my early discussion with Mr. Sakraida I described some experimenting we did at the Sweet Dairy in Oregon.

Q At the Sweet Dairy in Oregon?

A Yes.

Q Had you used pipes up there?

A This was one of the systems that we experimented with. We experimented with sprinklers and we experimented with hoses.

Q I believe you have built into the Sweet Dairy, by least the spring of 1962, a tank with an opening to let

this water cascade over the floor such as you claim in your patent?

A On an experimental basis, yes, we had begun that type of work.

Q You had actually built one that was being used in 1962?

A Yes.

Q And this was — was it written up in magazines or papers.

A No, sir.

* * * *

[45] Q Now these tanks that this water is stored in where it is collected, as you described it in your patent, is a pool, and those tanks also can be used, at least in some places they are used as a water trough, are they not?

A Yes, sir.

Q And in fact they are the same kind of metal — either metal or cement water trough like has been — long been used in the dairy business, are they not?

A Yes, with the exception of the paraphernalia to obtain the abrupt release of the contents of the tank.

Q And that is true and what is described in your patent here is the — I believe you call it a gate?

A Or water dam, hinged water dam.

Q That consisted merely of a — is described as a steel sheet that is hinged in the floor with a latch up at the top so that the latch can be knocked loose and this gate will fall down and the water will rush out?

A This is the description.

Q That is the description of it, isn't it?

[46] A Yes.



Q Is that the way you actually make them and build them?

A Sir?

Q Is that the way you actually make them and build them? Like I have described it?

A Yes sir, with refinements for mounting it in the concrete and other requirements.

Q But all it took, actually, was this piece of sheet steel with the hinge that was placed into the floor there at the opening of the tank and the latch at the top to hold it, that is what it consists of?

A This is one of the ways of obtaining an abrupt release of water.

Q And you don't claim there is anything too imaginative about this dam or gate, do you, and the way it is hinged into the floor and the way this latch is up there at the top to hold it and open it?

A Well, Mr. Hulse, you should have been an engineer. You grasp these things in a second. It took us months to conceive and develop it. Yes, there was a good bit of thought and time and energy and trial and error type work that went into the development of this system as it evolved.

Q Well, a hinged gate, there is nothing new about that, is there?

A No, sir.

[47] Q Generally speaking, for use?

A You mean like a gate to a garden or something like that?

Q I am talking about this gate or dam, if you want to call it a dam that has a hinge on it that falls down and lets something out.

A I have never seen a gate hinged in that manner.

Q Well, it is very similar to the ones on many of

these old dump trucks you have had around here for the last thirty years, isn't it?

A No, they hinge at the top so the gravel can run out.

Q Some of them hinge at the bottom, don't they? Haven't you seen any of them hinge at the bottom where the gate falls down?

A Yes.

Q It doesn't raise up, it falls down?

A I have — we never thought of using the dump truck body as a flushing tank. I have never seen it used in that way.

Q You never saw it holding water, in other words?

A No.

Q But the gate, essentially operates the same way as those on the dump truck where they hinge at the bottom?

A Essentially the same way.

Q Those things have been in existence for many many years, long before 1963, haven't they?

A Yes, sir.

Q Your patent also described another method that I don't [48] believe you have mentioned here and I suppose it is because maybe it isn't really used but under claim two you have a tank or a vat or tub or something of the sort in which water can be put and it is built — there are pivots so it can be tilted?

A Yes, sir.

Q And have you actually used that any?

A Yes, sir.

Q And where do you use that?

A At the Sweet Ranch in Oregon and at the Jack Daley Ranch in California.

Q You actually use these things?



A And at the Oakdale Farm which is known as Hollandale (PHONETIC).

Q Now there is nothing to the idea of this thing other than the idea of having a tank or vat mounted on a frame so that these pivots can be put to the side of it so it can be swung and dumped; that is all it is?

A That is basically how it works.

Q That is not a new idea, is it?

A There were elements I considered new at the time. We built those devices so that they would work automatically by shaping the end section of the tank in such a way that as it filled the tank became overbalanced and would rotate and dump, and then it was counter-weighted in such a way that it would set back up and we introduced water at a controlled rate so we could obtain an [49] automatic flush every four hours or six hours or whatever rate we wanted it to be introduced.

Q Is any of that described in the patent?

A Yes. That is a basic description of the tank.

Q Do you have it in claim two? Is it recited in claim two, those refinements you were just talking about?

A The illustration of the tank in the patent shows this construction.

Q But you will agree, will you not, there have been many vats or tanks built in the past, long prior to 1963, that worked on this pivot principal where you fill it with something that flows, liquid and simply tilt it on this pivot to dump it out; that has long been in use, has it not?

A For what use?

Q For dumping?

A I can't think of any installation. I have never seen one.

Q Well, I don't know whether you have ever seen one but probably you have seen a picture of a converter in a Bessemer steel furnace, such as in a steel mill where it is filled with molten metal and it can be dumped?

A Yes.

Q That has been in use for a hundred years, hasn't it?

A Yes, sir.

Q It was in use long before that, back in Roman times [50] when they made those things up on top of a fort and put hot oil and water in them and they would dump it out on the enemy when they approached.

A I am afraid you are back in the Bible again.

Q I am not trying to get back to the Bible. We will stick to the secular. You have heard of that, haven't you?

A Of the Romans, no sir, I haven't heard of that.

Q Too far back, is it?

Anyway, you do know about the Bessemer principle.

A That would be similar, but of course Bessemer is not used for an abrupt release of steel or anything like that.

MR. HULSE:

I believe that is all, if the Court please.

THE COURT:

Do you have anymore questions at this time?

RE-DIRECT EXAMINATION

BY MR. KOLISCH:

Q In your experience and knowledge did you ever



know of a use of water in an accumulation in a dam, whether it is behind a dam or in a tank, in a dairy or similar establishment which could be released suddenly for purposes of washing?

A No, Mr. Kolisch, we did not know of such a use. If I had known of such at the time we developed this system we certainly would not have gone tc the expense of getting patents and the trouble and trials we have gone through.

Q And since 1963 have you ever found a single instance of such use in a dairy any place?

[51] A In the travels I have done since that time, and they have been extensive — last year I travelled 90,000 miles in the capacity of designer, as a consulting service to the dairy industry, and I have not found a single installation that was in use prior to our initial work that anticipated that work.

Q The initial work you did, you are referring to the work at Sweet's, and this was experimental in nature?

A Yes.

* * * *

[52] ROBERT B. PRICE, JR.

having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

[53] DIRECT EXAMINATION

BY MR. HULSE:

Q Will you state your name please?

A Robert B. Price, Jr.

Q And where do you live, Mr. Price?

A I live at 7345 Northloop Drive, El Paso.
Q How long have you lived in El Paso, Texas?
A All my life.
Q And in what business are you engaged?
A I am in the milk production business, primarily.
Q How long have you been engaged in that business?
A Actively since I graduated from college in 1949.
Q And from what college did you graduate, then?
A That was the University of Wisconsin, the post graduate. My primary college education was at Texas A. & M.
Q Did you graduate from Texas A. & M.?
A Yes, sir.
Q Followed by how much time at the University of Wisconsin in post graduate work?
A One year post graduate work.
Q And I will ask you whether or not you individually or through a corporation operate a dairy in El Paso, Texas?
A Yes, sir.
Q And what is the dairy's name?
A Price's Producers, Inc., doing business as Price's [54] El Paso Dairy.
Q And is that located in El Paso County, Texas?
A Yes sir, at the same address where I live.
Q And just for the purpose of indicating whether it is a small or large operation in dairy terms would you say it is small or a large dairy?
A It would be a substantially large dairy.
Q And how many years have you been engaged in the business of producing milk through dairies?
A Going on 22 years.
Q I will ask you whether or not you have had occasion during that time to become familiar with the dairy business in the United States?



A I feel that I have, yes sir.
Q I will ask you, have you had at your dairy cattle that you show at various and sundry cattle shows?
A Yes, sir. We do show cattle.
Q Over various parts of the United States?
A You might say nationally, yes.
Q Have you had occasion to visit other dairies over the United States so as to be familiar with dairies generally?
A I have visited quite a few dairies.
Q I will ask you whether or not you are familiar both from what you know from your own dairy here in El Paso County, Texas and from other dairies you have seen, with the kind of dairy [55] barn installations that were used, at least in places in this country prior to 1963?
A Yes, sir.
Q I want to ask you, Mr. Price, about the various and sundry elements as they are set out in a patent which is described as being patent number 3,223,070 granted to Donald Joseph Gribble and Henry E. Bennett on December 14, 1965.

I want to ask you about some of the elements that are set out in this patent and with respect to each one of them I will ask you as to whether or not the items described there in the dairy barns had been in use prior to 1963 in the dairy business and the first item is — says a dairy barn for cows and the like, including a smooth evenly contoured paved surface forming a floor providing a walking surface for cows in the barn. I will ask you whether or not — what we have described there — what I have read to you was used in the dairy business prior to 1963?

A I think as a general description of a barn floor this would adequately fit.

Q And specifically had they or not been in use in the dairy industry prior to 1963?

A Yes, sir.

Q Do you have any idea how far back floors of that kind have been used in dairy barns?

A Well, of course even prior to 1963 for a good many years a smooth concrete floor had been required to produce grade [56] A milk by the United States Public Health Service.

Q And the next item is a drain means for draining wash water from such floor opening to the top of the floor. Are you familiar with a drain such as described in that clause I have just read to you?

A Well, every barn floor would have to have a drain because you have to make a provision for drainage to qualify as a grade A producer, yes sir.

Q I will ask you specifically whether a drain as described in the clause I just read to you was in common use in the dairy business and dairy barns prior to 1963?

A Definitely, yes sir.

Q And the next item is ". . . said smooth, evenly contoured surface which forms such floor sloping towards said drain means whereby wash water discharged on the floor may be collected and disposed of through said drain means . . ."

Does that describe a floor of a barn such as was in use prior to 1963 or not?

A Yes, sir. This would apply to our own barn for many years.

Q For many years? How far back would you say?

A Back to — well, the original El Paso Dairy was



built in 1911 and had this very provision, same provision.

Q And the next item, ". . . said barn further including multiple rest areas with individual stalls for each cow and with [57] each of said stalls having a bottom which is also of smooth pavement. . . ."

Was that in use or not in the dairy barns prior to 1963?

A It was in many parts of the country, primarily in the Northern part of the country.

Q And were you familiar with — from having seen them?

A Oh, yes, I have worked in barns of that type.

Q And this is all prior to 1963?

A Yes sir.

Q And then it continues, this is all one long sentence and I have broken it down into parts, it continues with the next clause, ". . . but which is disposed at an elevation above the paved surface forming the floor . . ."

Was that also in use in the dairy barn prior to 1963?

A I don't quite follow that sentence.

Q Let me go back and pick up the clause immediately ahead of that because I guess they are tied together: ". . . including multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also of smooth pavement, but which is disposed at an elevation above the paved surface forming the floor . . ."

A Oh, yes, yeah.

Q Was that in use in the dairy industry before 1963?

A Yes, sir.

Q And then it continues: ". . . said stalls being [58] dimensioned so that a cow can comfortably stand or lie

in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn . . ." I will ask you whether or not that was in use in dairy barns prior to 1963?

A Yes, sir.

Q And it continues: ". . . said barn further including the defined feeding areas having feeding troughs with means for discharging feed to the troughs . . ." Was that used in dairy barns prior to 1963?

A Yes, sir.

Q It was used?

A Yes, sir.

Q Then it says: ". . . a cow holding area . . ." were those in use or not prior to 1963?

A Oh, yes.

Q Did you find them in all dairy barns?

A Most dairy barns would have a cow holding area.

Q The next one: ". . . a milking area . . ." Did you find those before 1963?

A Very definitely, yes sir.

Q And the next item: ". . . and a transfer area all bottomed with the walking surface forming said floor in the barn . . ." Did you find those prior to 1963?

A Well, depending on what is meant by a transfer area. If it is the area between the holding area and the milking area, [59] certainly, those have existed before that time, yes sir.

Q ". . . and floor-washing means for washing the floor providing the walking surface in the barn where said floor bottoms said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into said drain means, said floor-washing means including means located over a region of said



floor which is up hill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over said floor . . ." Were you familiar with anything that fits that description?

A I hadn't seen or used prior to 1963 a holding device but as far as the use of flood water, yes, we have used that ourselves to replace the holding device, a number of high pressure water hoses and of course I have also seen and also seen pictures of operations where water was diverted, natural flowing water was diverted from a stream, natural stream through a barn to wash in a sheet of water, to wash the offal.

Q I will ask you whether or not prior to 1963, was the washing with water of the floors of dairy barns in common usage and practice in this country?

A Most definitely, yes sir.

Q And I will ask you whether there were several different means of introducing water onto the dairy barn floor in order to wash it?

[60] A Yes.

Q Could you tell us what some of those means were?

A Well, as I said, by hose, by flowing sheets of water such as diversion of a stream, and in colder climates, use of lime to sprinkle on the manure where the dairymen didn't want to wash offal away because of the coldness.

Q Do you know whether or not it has also been done by the use of putting the water on the dairy barn floor through pipes, either through the end of the pipe or through perforations that sprinkled it or sprayed it?

A Oh, yes.

Q Have steel tanks and concrete tanks been used in the dairy business prior to 1963 as water troughs?

A For many years, yes sir.

Q And some of those are, I assume, would be sizable? What size tanks, in gallons, would you say you knew have been used as water troughs, either steel or concrete?

A I would say holding from 100 to 500 gallons.

MR. HULSE:

I believe that is all.

Your witness, Mr. Kolisch.

CROSS EXAMINATION

BY MR. KOLISCH:

Q Mr. Price, I believe you said that you had seen or heard of the use of water from a stream to wash the floor of the dairy barn?

[61] A Yes, sir.

Q Would you describe for us how that took place and where?

A Yes, I would be happy to. I have an associate in our business, a nutritionist who travels extensively and he had an account in central America — in Coastal America and on his tour of dairies in Costa Rica, in the mountains he came across several instances where water was diverted from a stream through a barn to clean out the offal, to do the washing and he brought back pictures. I do not have the pictures myself but he brought back pictures of this and I was very much interested to see this method of cleaning.

Q You have never seen these installations yourself?



A Not personally, no.

Q And they are not in this country, this is in Costa Rica?

A Well, I have seen reports of others in the country.

Q The one you are talking about, the ones you were telling me about, those are in Costa Rica?

A The one I have seen the pictures of, yes sir.

Q And where are they in Costa Rica?

A In the mountains of Costa Rica. It is not a very big country. It wouldn't be hard to find.

Q You have no local —

A — I can get the address.

Q You don't have it?

[62] A I didn't come —

Q — did you give it to your counsel prior to testifying?

A I believe the counsel, I believe Mr. Hulse has seen pictures of this, seen copies of the pictures.

Q I am asking with respect to the address.

A The address, no, I have not given the address.

Q What year was this supposed to have taken place in Costa Rica?

A It did take place. It is taking place now, and this was two years ago when Dr. McDaniel, our nutritionist was there.

Q That would have been 1967?

A Yes.

Q These pictures of this installation were in 1967?

A The installation was a number of years old.

Q How do you know that?

A All right. It is hearsay

Q As far as you know?

A I wasn't there.

Q The pictures you saw were something that took place in 1967?

A That's right.

Q Let's talk about this country. Did you ever know of a barn cleaning system that existed in this country prior to 1963 in which the water was collected as a pool on or above the floor of the barn?

[63] A My own knowledge?

Q Tell me about your own installation.

A I have a large storage tank that holds 50,000 gallons. We have a pressure pump connected to this and using two or three hoses with at least 50 pounds of pressure we flood the water — flood the floor and wash the offal.

Q Through hoses?

A Through hoses, yes, which are outlets to the tank, as far as I am concerned.

Q The water comes out from a nozzle of a hose, doesn't it?

A That is the means of transportation, yes.

Q Did you ever hear of any barn where there was such a tank and the tank and the water were suddenly released to flood, to wash down as a sheet of water?

A Prior —

Q — to 1963?

A No, I have not.

MR. KOLISCH:

That is all I have.

MR. HULSE:

That is all, Mr. Price.

May this witness be excused?

THE COURT:

Yes.



MR. HULSE:

If the Court please, I stated to the Court before noon that I might have two witnesses but I am going to put on the stand only this one and I want to check about the papers to be sure. My understanding is the deposition of Mr. Gribble, which [64] was taken before the time of the summary judgment is considered in evidence and therefore part of the record in this case. Do we consider the things that were in the transcript when this case went up to the Court of Appeals as being in the record here today?

THE COURT:

Yes, I will consider the entire transcript for whatever use counsel may want to put it to and whatever use I may want to put it to for determining it. Either one of you may refer to anything in there you want to.

MR. HULSE:

Is the Court's file in here?

THE CLERK:

Yes, sir, but there was no transcript of evidence in this record on appeal.

MR. HULSE:

No, there would not have been one because it was a summary judgment.

I filed in there a request for admissions about certain items and I would like to use the file.

THE COURT:

The clerk will find it.

MR. HULSE:

If the Court please, if I may, I would like to offer those in evidence from that file.

THE COURT:

You may offer them and you may read them if you want to or you may just offer them.

MR. HULSE:

I will just state what they are, if the Court please. This was the defendant's request for admission of the genuiness of document one, the application of D. J. Gribble for the patent bearing patent office number 3,223,070, together with the applicant's admendments thereto, the patent examiner's [65] opinion on the original application and each one of the admendments, all being marked exhibit A attached hereto.

Number two are the documents attached to this request and marked exhibits A-1 and A-2, copies of "Cattle shelters and equipment for South Carolina", Extension Agricultural Engineering Handbook Number Two, December 1958, pages 21 and 26, published in 1958 by the Clemson University Agricultural College, Clemson, South Carolina.

Three, a document marked exhibit B, being a copy of page 13 of a document published by Babson Brothers Dairy Research Service in 1959, entitled "The Way Cows will Be Milked On Your Farm Tomorrow."

Four a document consisting of nine pages, marked exhibit C and being a copy of the K. Luks patent, bearing patent office number 1,968,564 and dated July 31, 1934.



Five, a copy of a document marked exhibit D and consisting of eighteen pages and being a copy of the F. J. Kreutzer patent bearing patent office number 1,981,417 and dated November 20, 1934.

Six, a copy of a document marked exhibit E and consisting of ten pages and being a copy of the F. J. Kreutzer patent bearing patent office number 1,981,418 and dated November 20, 1934.

Seven, a copy of a document marked exhibit F and consisting of twenty pages, being a copy of the H. McCornack patent bearing patent office number 2,081,947 and dated June 1, 1937.

The genuiness of these copies of documents was admitted by the plaintiff and they are attached hereto and I offer them in evidence, without reading the details of all of these documents [66] themselves.

THE COURT:

All right. They will be admitted. The transcript, as I said, will be available to either one of you if you want particularly to call the Court's attention to some item in there.

MR. HULSE:

A patent which was not on that list, Mr. Kolisch, but with which I think you are familiar —

MR. KOLISCH:

I am familiar with the Bogert patent, but you haven't complied with section 284 of the statute. You haven't given me the proper notice.

MR. HULSE:

Well, I understand. I am just now showing it to you

but you have long been familiar with it. I will ask you if this is a copy of the Bogert patent?

MR. KOLISCH:
Yes, sir, that is a copy of the Bogert patent.

MR. HULSE:
Then I will offer it also, patent number 2,233,766, dated March 4, 1941.

* * * *

[67] THE COURT:
Well, the Court will admit it but if you need time — you say you are familiar with it; if it is necessary for you to have more time to rebut it I will give you that time to do it or if you want to supplement it or offer something to the contrary I will permit it.

MR. HULSE:
I want to offer two statements from the brief filed by counsel for plaintiff in their supplemental memorandum in opposition to defendant's motion for summary judgment. I will offer the entire document, I suppose would be the proper way to get it in, and point out to the Court the two statements that I offer it for. They are to be found at pages 9 and 13 respectively. I offer it for the statement on page 9 — I was mistaken, it is page 8, beginning at line 27, the statement "Plaintiff does not deny that the patent is made up of a combination of old elements, just like most other patents. However, plaintiff's position is that the combination of elements called for in claims one, two and three of the patent (listed in simplified form above) had never been combined as specified, and the result of combining these elements was to produce a completely new dairy barn construction which was not only different from anything that had existed prior to it, but so far superior and produced such unexpected results that it achieved wide spread commercial success and recognition among persons, institutions and businesses who are the most knowledgable in this field." And that is offered for the purposes of the admission that it was made up of things that were old, merely a combination patent.



[68] And for the same purpose and to the same effect, the statement on page 13 of this supplemental memorandum where it states, beginning with the last word on line 21 and proceeding thereafter: "Plaintiff admits that all the elements are individually old, but no one prior to the inventors ever combined the elements as called for in the claim."

THE COURT:
All right. Mark that as a defendant's exhibit.

THE CLERK:
Defendant's exhibit C, Your Honor.

THE COURT:
All right. We better include the entire transcript so that either one can refer to it, the record on appeal.

* * * *

DARRELL LLOYD REED
having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. KOLISCH:

* * * *

[69] A No, sir.

Q What business are you engaged in?

A I am a milk producer. I am a dairyman.

Q Where do you have a dairy?

A I have a dairy at — just north of Waco, Texas.

Q Could you tell us roughly about the size of your dairy?

A We milk 325 cows with an assortment of dry cows and heifers come into all dairies for a combined total of about 600 head of cattle on the premises.

Q How long have you been in the dairy business?

A Oh, basically — of course I was reared in Wisconsin on a dairy farm. I grew up on a dairy farm and outside some years spent in the service and so forth, why, I have basically been in the dairy business all my life, outside of those interim periods.

Q How old are you now?

A I am 51.

Q Do you belong to any dairy organization?

A Yes, I am a member of the Associated Milk Producers, Inc.

Q Tell us what that organization is.

A Well, it is basically a milk marketing organization. I believe it has 43,000 members, dairymen. This is the only — you have to be a bona fide producer to be a member of this organization. It covers — goes from the Gulf of Mexico to Canada and it covers, I believe, about 21 states. I have served on the board of directors [70] of the various milk associations. I have traveled quite a



bit with that and for this milk association. This is an offshoot of many organizations, actually. I was on the original board in the original group that started the founding of this large organization and it, of course, has continued to grow from there. At the present time I am a voting delegate for the southern district or southern division in area seven, which is the area I represent.

Q Have you been a delegate to conventions of this organization?

A Pardon?

Q Have you been a delegate to conventions?

A Yes sir, I am at the present time a voting delegate for this. We just returned from Chicago from our last annual meeting which was over Labor Day.

Q Is this the meeting President Nixon addressed?

A Yes, sir.

Q Now in the course of your business have you acted on any panels? Have you been active in educational institutions or conferences involving your business?

A Yes, sir. I have been — let's see, last November I was on a panel down to A & M College at College Station, Texas. I have been on some panels.

Q What was the subject that you had under discussion at that last conference at A & M that you referred to?

A Well, this was on liquid manure disposal systems and [71] I was on the panel to the fact that we have one and our experiences with it and so forth. This is what they were trying to bring out.

Q Now going back to the period prior to 1963, will you tell us from your knowledge what was the best available way of cleaning and removing manure from dairy barns?

A Well, going back to when I was dairying in the north, your mechanical cleaners which was a series of chains that runs through a gutter that elevated it up into an outside spreader. We used tractor blades, scoop shovels, scrapers, high pressure hoses, brooms.

Q How satisfactory were those systems?

A Well, they were never a hundred per cent satisfactory. It wasn't quite such a problem in years back, and this was kind of the accepted way to do it. Labor was a little more plentiful, a little cheaper, but as this — as the dairy industry grew this problem became more acute from the standpoint of labor, getting somebody to do it, and our health standards, of course, during this same interim period were constantly becoming more stringent and what was good enough ten, twenty years ago is not good enough today. We had to find better methods of cleaning, to do a better job of cleaning. This all had a part in it.

Q Do you have a patented Ag Pro system in your dairy?

A Yes, sir.

Q When did you get it?

A We started milking in the barn in April of 1970. We [72] started construction in August of '69.

Q Prior to purchasing the Ag Pro system what investigation, if any, did you make with respect to barn cleaning systems?

A Well, I had, of course, gone into many types of installations. I checked to the best of my ability pretty thoroughly and I checked with A&M College. In fact this was my first stop, to see what they had to offer and also with various feed companies and some of them had some planning services, and our own milk association, to a limited degree, has a planning service. I went to some research farms up to Kansas City, Missouri. Farm Land Industries has a research farm where they have free stall housing which I was also interested in, but there again they had the concrete and tractors and blades plus the fact of — I have seen dairies over a good portion of the United States and they just never quite come up with the answer to this cleaning problem where it was completely satisfactory.



Q Where did you see the first working Ag Pro installation?

A I seen my first working Ag Pro installation at Cameron, Texas at Elm Creek Farms.

Q Roughly what year was this?

A This was in approximately February or March of the year 1969. One of the representatives of Ag Pro heard that I was going to build a new installation and came by to see me and consequently picked me up and took me down and this is where I seen my first flush system.

Q Will you relate to us as completely as you can what your impression was when you saw the Ag Pro system?

[73] A Well, of course this was so revolutionary from the methods we had been using over the years, and like I say, I think I was kind of born on the end of a manure scoop. We had done this since childhood and the thing I think that probably impressed me the greatest was the cleanliness of the thing after the flush. This was, as I was referring to it later, it was the clean, clean, you know, much better than what we had been able to do with our scrapers and hoses and so forth in the past.

Q Under the old system the scrapers and the hoses

— did you hose down areas other than those in the milking and immediately adjacent to the milking areas?

A No, sir.

Q How were those areas cleaned?

A Well, those areas were just bladed, usually, with a blade on a tractor, just bladed it off and loaded it, usually, with a front end loader on spreaders and carried it out.

Q Now from your experience with the Ag Pro system can you make any comparison with respect to the length of time it would take you to clean an area in a confined type of barn operation such as I understand you have for say 100 cow group?

A Well —

Q — I would — excuse me, I would like for you to compare cleaning under the old — the best old method that you were familiar with and how long it would take to do a comparable job with the Ag Pro system.

[74] A Well, I will have to speak for my own cow group. We have 62 cows to a group. They are housed, fed and everything within this area. The physical time involved in cleaning that with this system is two or three minutes. In other words, the length of time it takes to drop our gates and close them back up. Now to try to compare that to a comparable cleaning job is a little difficult but to blade it off and hose it down and come to the same degree of cleanliness, I would say, it would take a minimum of about three hours to drag this out and hose it and broom it down to this degree.

Q As a practical matter, did you, under the old system, ever maintain all of these areas, not just the milking area but all the living areas under these conditions of sanitation?

A No, sir.



Q Such as you have with the Ag Pro system?

A No, sir.

Q Why didn't you?

A It was just not feasible.

Q You are talking about the economics of it?

A From an economic standpoint, you never could accumulate that much labor to clean and hose and brush that large an area. It was just not feasible.

Q I don't know if you have testified to this or not, but when an area such as you have described is cleaned by the Ag Pro system is it entirely cleaned so that you would say it is shining clean?

[75] A Yes.

Q Putting yourself back to the period of 1963, was the Ag Pro patented system what they did? Was that obvious to you at that time?

MR. HULSE:

If the Court please, what was obvious to this man, I don't think is material.

THE COURT:

That's right. I will sustain that.

Q In 1963 was it ever suggested to you by anyone or any publication or anything you had ever heard of to have a barn cleaning system like the Ag Pro system?

A No, sir.

* * * *

M. G. HUBER

having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. KOLISCH:

Q Can you hear me all right, professor Huber?

A I think so.

Q You have a little trouble in hearing in this courtroom?

A Yes.

Q Will you please state your full name and your address?

A My full name is Milam George Huber, signed M. G. Huber, [76] generally. I live in Corvallis, Oregon.

Q What is your present occupation?

A I am presently retired and doing some consulting work.

Q Prior to retirement what did you do?

A I was an agricultural engineering specialist with the Cooperative Extension Service at Oregon State University.

Q Will you tell us generally what the nature of your work was and if there was any particular field in which you specialized?

A I was — I worked with county agents. I worked with farmers and I worked in the area of farm building, planning, layout, designs, animal waste disposals, anything that had to do with farm building, although this did not take all of my time. Probably 40 to 50 per cent of my total time was devoted in this area.

Q Will you give us your educational background?



A I am a graduate from the University of Wisconsin in Agriculture — with a major in agriculture. It was a major at that time. Now it is a degree. I graduated in Mechanical engineering from the University of Wisconsin and I did some graduate work there and at the Pennsylvania State University.

Q What is your present age?

A 66.

Q Will you tell us briefly about the nature of the work that you have done since you have completed your degrees at the institutions that you mentioned?

A After I completed my degree work at the University of [77] Wisconsin, of course, this was during the depression years and I had a few miscellaneous jobs up until 1935. Then I was appointed as an instructor in agricultural engineering at Pennsylvania State University, at that time Pennsylvania State College. In 1936 I accepted a position at the University of Maine in the school of agricultural engineering and I was there until 1945. From 1945 until my retirement I was at Oregon State University.

Q Are you a member of any professional societies?

A I was for about 30 years a member of the American Society of Agricultural Engineers.

Q Are you the author of any publications in the field of agriculture?

A Yes, numerous publications in my field. I do not recall the number but I know that it is at least 30 or more and that includes, for example, dairy housing and animal waste disposal. I published the first publication in the United States on free stalls or individual stalls as they are now used and used in this layout and worked on poultry houses, beef animals, sheep, hogs, everything I guess, all kinds of livestock.

Q Have you studied the Gribble patent which is in litigation here?

A Yes, I have read it and re-read it.

Q Have you also studied the prior art publications which the defendant gave us notice he was going to rely upon at this trial?

A I believe there were six of those. There were two publications [78] and four patents. I have read all of those and looked at them very carefully.

MR. KOLISCH:

I am going to offer Professor Huber as an expert. Do you wish to question him?

THE COURT:

What opinion are you going to ask him?

MR. KOLISCH:

He is going to be asked with respect to the prior art in this field and with respect to the patent in suit and with respect to the prior specific instances of prior art.

THE COURT:

Well, go ahead. We will pass on each question when you get to it.

Q (MR. KOLISCH) Now considering the situation prior to 1963, what was, or were there any problems with respect to — specifically to dairy barn construction and the removal of waste products and manure?

A I think all dairy farmers considered that one of their major problems in the dairy enterprise, removal of manure from the cow area.

Q Is there any particular reason why this is such a problem or was a problem?



A Most people don't like to work at the particular job. Not only that, there is a considerable volume of this material to be moved and of course if the farmers don't do a good job the milk inspectors will be after them. Hence, it meant it had to be reasonably clean. Now of course that can be argued, what is reasonable, but it had to be clean enough to comply with the milk inspector's [79] requirements and it took some time — not only that, but took a considerable amount of time. I did that when I was a boy and I just hated the thing.

Q You refer to volumes. Do you have any information concerning the amount of manure that is produced on a daily basis by a cow, for instance?

A Yes, there are tables that have been prepared and, incidentally, I prepared the first table on that in the United States, on the volume of manure produced by various animals. It has been changed somewhat since. For example, let's take a large dairy animal, a 1,600 pound cow, and it will produce, probably, 16 to 17 gallons of manure per day. That means solid material plus the urine plus the liquid. Now this can be a little more or a little less, depending on whether the cow is a big producer and takes in a lot of feed or whether the cow is dry. It just depends on the cow. Also, what she may be fed at the time. Those are variables, but those are guidelines that we use. Then too, if we want to look at it another way it will take probably about 16 cows to produce one ton of manure and if we have a hundred cows we have got 6 or more tons of manure to handle every 24 hours, which is considerable weight.

Q And what was the situation in 1963 with respect to the best known ways of removing manure?

A I don't believe that there was any one best way, although all the people in the state of Oregon used

scrapers in a loose housing layout. We need to distinguish between the type of housing. For [80] example, whether it was loose housing with free stalls or just plain loose housing or a station type barn. In loose housing they use scrapers and supplement it with a hose under pressure and in some types of barns they have the gutters and conveyors and some still use the hand shovel or fork.

Q When did you first personally become acquainted with the Gribble-Bennett invention?

A About early 1963, I believe. That is when it was, somewhere around that time. I am sure I am not very far off.

Q And do you recall what the circumstances were and where you saw it?

A I saw it at Sweet's Dairy at Sixes, Oregon.

Q What impression did the invention make on you when you first saw it?

A It made a great impression on me. It was a complete new concept in manure removal, in cleaning the dairy barn, different than anything that had ever been used. I might add, with your permission, that the key to this concept is this: water has energy and it can be used in many different ways. In a hose the energy is used by impact, under pressure, external force that is applied to this pressure — to this water, whereas the water that comes down as a sheet or wall of water has built in energy because of its elevation and as this water is released it does the same thing water does in a flooded stream. As this water — I will try to make this clear, and I hope I can, on the surface of this pavement there are [81] these piles of manure droppings. This pavement is smooth and this water moves down over this manure. The water at the bottom has more friction



than this water on the top and it keeps moving ahead and as this water keeps moving ahead we get a rolling action of this water which produced the cleaning action. That is the key to this method of cleaning. You do not get this in a hose. You do not get it in a gutter as has been used in the past. I might just mention a little bit about the hose. This squirting water on a floor — probably have done it on our own sidewalks or walkways, and I just mention that, that unless that water is continuously directed towards the cleaning area the cleaning action almost ceases instantaneously. Now the movie that was shown earlier very dramatically illustrated that point. The cleaning action — as soon as the hoses moved to one side the cleaning action ceased here and that is why this hose was moved back and forth, to drive this stuff on down to where we want it. I am wondering if that explains it?

Q Yes. I think that is correct. This is what you observed in the movie that was shown here, plaintiff's exhibit 9?

A Yes.

Q In 1963 had this concept ever been suggested to you?

A Not to my knowledge, in no way whatsoever.

Q Will you refer now to the prior art relied upon by the defendant?

The first is an article entitled "Cattle Shelters and Equipment for South Carolina", Extension Agricultural Engineering Handbook No. 2, [82] December, 1958, pages 21 and 26. What comment do you have to make with respect to that publication?

A This shows nothing more than the conventional floor plan that was used about that time in many areas of the United States. There is nothing in this plan that has anything to do with cleaning or washing floors. It

is simply a conventional type of plan. That is all it is.

Q Will you now refer to the second publication which is entitled "The Way Cow's Will Be Milked On Your Farm Tomorrow" by Babson Brothers Dairy Research Service, 1959, page 13. Here is a copy.

A Well, all this does — it is just another plan for conventional loose housing which had been in use for some time. The same cleaning methods are used here that have been in use for quite some time, either scraping — scraping is required and if further cleaning was required then water under pressure — external pressure was used. That is about all. There is nothing in this that is new or different compared to the Gribble-Bennett method of flushing.

Q Would you look at the Luks patent, patent number 1,968,564 dated July 31, 1934?

A Yes.

Q What comment do you have to make about it?

A This patent shows a milking apparatus on a moveable plat form which carries cows in a circle through a series of positions where it is sprayed and then milked and then released. It has a [83] gutter which is something that has been in use for a long time. It has drain pipes which is no different and has been in use for some time. It uses wash water and the refuse from the cows is carried away in this wash water and there is no — that teaches nothing new. In other words it is, again, just using the old conventional methods of a little water washing it away, the manure, which is exactly the same as has been done over a period of years.

Q Refer to the Kreutzer patent, number 1,981,417. What does that patent show?

A All this shows is a combination animal housing-feeding structure. This is a fire-proof construction and



of course it is ventilated in such a way where it was to store, let's say, maize, hay or partially dried hay. I don't think they ever put green hay, but partially dried hay to obtain drying in the storage by additional air movement or natural ventilation. This did not work satisfactorily under all conditions. It has nothing to do with the barn cleaning whatsoever.

THE COURT:

Excuse me just a minute.

(SHORT RECESS)

Q (MR. KOLISCH) I believe I asked you about the Kreutzer patent number 417. Would you tell us about the Kreutzer 418. Have you testified concerning that patent yet?

A No, I don't believe I have. That particular one, again, calls for fire-proof buildings or metal buildings and the buildings are arranged in different patterns and units put together in different [84] combinations. Now there is nothing in this that concerns barn cleaning at all.

Q I will call your attention to the Mc Cornack patent, number 2,081,947?

A Yes.

Q What comment do you have to make with respect to it?

A Again, this one uses water pipes to various portions of the barn such as the milking area, the out-stall areas, and gutters are provided for leading away the water. This barn, as I see it, does not have anything pertinent to this particular case because it has gutters and a system of water pipes throughout various parts

of the barn. This is nothing more than a conventional barn that uses hoses and pipes at various locations. This has been done, I am sure, prior to this patent and also, until rather recently — and is still being done.

Q With respect to this Mc Cornack patent can the manure and other waste products be removed simply by the use of water, according to this system?

A Well, as an engineer, that would be a hard question to answer without knowing specifically how much water we were using, how much pressure there was back of the water, the type of nozzles and everything. It probably could be done but I would need to know some of the things that I haven't been able to determine out of this patent. It has probably been done in this particular instance but whether anybody else could take this patent and duplicate the same [85] thing, I don't know whether that would be possible or not.

Q According to the Mc Cornack system, would it be necessary to use hand labor?

A Maybe in some instances, yes, I would expect that it would be necessary.

Q How about using the hoses?

A Either that or portable hoses in order to get the complete cleaning job such as we get from the Gribble patented flush system.

Q Is there any suggestion in that Mc Cornack patent of collecting water as a large pool for sudden release?

A No, I did not run across anything like that and the patent itself mentioned that brooms may be necessary in some instances. This reverts back to hand labor.

Q Would you look at the Bogert patent, 2,233,766?

A Yes.



Q Have you looked at that patent before?

A I have looked at this patent and again it has a gutter and it is a gutter system layout. The gutter system — and it does some washing of the stalls, by, I believe — probably I should look at this a little more, I am not thoroughly refreshed on this but I believe it uses a system of hoses or sprinklers in doing the cleaning.

Q Does the Bogert patent have any suggestion of collecting water as a large pool for sudden release to flush the barn floor areas?

A No, not in the same way as used in the Gribble and Bennett [86] flush system.

Q Considering all of these prior art references about which you have testified, do any of them either individually or in combination, that is taking any one patent as such or taking various elements from all these patents about which you have testified, do any of these teach the patented Gribble-Bennett invention?

A No.

* * * *

CROSS EXAMINATION

BY MR. HULSE:

* * * *

[90] Q Now you said awhile ago that — speaking of water rolling down the floor in a sheet that the water contained energy because of the fact that this floor is sloped and it starts out at an elevation higher than the other end of the floor, is that the size of it?

[91] A The water contained energy.

Q And you said it had energy in this instance because of its elevation?

A Right.

Q And that means the energy is used to wash manure off the floor as this water flows down the slope or grade of that floor?

A Right.

Q And it is due to the elevation where it starts that it gets this energy that accomplishes this purpose?

A Yes.

Q And if water were introduced at the same slope it would have the same energy, wouldn't it?

A The same quantity of water. May I ask you a question?

Q Well —

A — the same quantity of water. The same quantity introduced the same way would have the same energy.

Q So the fact that this energy is derived from this water flowing down a slope — that is part of the process of gravity, isn't it?

A Yes.

Q And one of the essential things about this whole system is really that you are using a gravity system of water flow, isn't it?

A We are using the force of gravity.

Q And really it is just that simple, that it is a gravity [92] system, isn't it?

A No, absolutely not.

Q This matter of washing dairy floors of a dairy barn off with water introduced to the floor one way or the other is an old thing, isn't it?

A It all depends on how we are using the water that is introduced onto the barn floor.



Q Well, —

A — and the quantity of water.

THE COURT:

Answer the question. You can explain your view. Repeat the question.

A All right. Yes.

Q And water has been introduced onto the floor of dairy barns in the past over many years by different methods such as, number one, the diversion of water from a nearby stream across a dairy barn floor?

A I never heard of that.

Q You never heard of it?

A No one ever called it to my attention.

Q Well, you have been in the courtroom all morning and you heard counsel for the plaintiff in his opening statement refer to Hercules cleaning the augean stables. You have heard of that, haven't you?

A Yes.

Q And that is the way that was done in that story so long [93] in existence, was it not?

A That is what the statement says, yes.

Q That is what the statement says, so at least the idea is not new, is it, of washing a barn floor out with water?

A The idea of washing with water has been done for a good many years, using hoses.

Q I was going to say it has been done by using hoses.

A It has.

Q It has long been done by using pipes in one fashion or another?

A Yes.

Q Now as a matter of fact for a considerable length of time this business of washing dairy barn floors with

water in one way or another to get them clean has been required by law in various states if you are going to produce grade A milk, hasn't it?

A Yes.

Q So they have had to be washed off one way or another over many many years?

A Yes.

Q And that is long prior to 1963?

A Yes.

Q Now you were asked about what was called the prior art filed here, about these two publications and about several different ones, but let me ask you, professor Huber, about the elements as described in claim one of the Gribble patent. I want to ask you [94] about these things described here having been in use long prior to 1963, and first — here is the place so you can follow me. I see you have a copy of it there with you. It says "A dairy barn for cows and the like including a smooth, evenly contoured paved surface forming a floor providing a walking surface for cows in the barn . . ."

The item described there has long been in use prior to 1963, has it not?

A Yes.

Q And the next item: ". . . drain means for draining wash water from such floor opening to the top of the floor . . ."

These drains as described have long been in use, have they not?

A Yes.

Q When I say "long been in use" I mean, in each instance, at least prior to 1963.

The next item: ". . . said smooth, evenly contoured surface which forms such floor sloping towards said drain means whereby wash water discharged on the



floor maybe collected and disposed of through said drain means, said barn further including —"

I am going to break it off.

That has long been in use?

A It has been.

Q I am just talking about the floor and drain?

A Yes.

Q And the next item then says: ". . . said barn further [95] including multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also of smooth pavement . . ."

And those have long been in use, have they not?

A Yes.

Q And the next item says: ". . . but which is disposed at an elevation above the paved surface forming the floor . . ." and that has long been in use?

A Yes.

Q ". . . said stalls being dimensioned so that a cow can comfortably stand or lie in the stall but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn . . ."

And that has long been in use?

A Yes.

Q ". . . said barn further including defined feeding areas having feeding troughs with means for discharging feed to the troughs . . ."

And various means of doing that have long been in existence, have they not?

A Yes.

Q And next: ". . . a cow holding area . . ."

That has long been in existence, has it not?

A Yes.

Q ". . . a milking area . . ."

[96] And likewise that has been in existence a long time, has it not?

A Yes.

Q ". . . and a transfer area . . ."

That likewise has been in existence many years, has it not?

A Yes.

Q ". . . all bottomed with the walking surface forming said floor in the barn, and floor washing means for washing the floor providing the walking surface in the barn where said floor bottoms said feeding, holding, milking and transfer areas . . ."

Down to that point about having a floor there which can be washed off, before we get down to the means, that has long been in use, has it not, washed by one means or another, whether hoses or pipe or spray or whatever?

A Yes.

Q And then continuing, it says: ". . . operable to send wash water flowing over the floor with such water washing any cow offal thereon into said drain means, said floor washing means including means located over a region of said floor which is uphill from said drain means, constructed to collect water as a pool above said floor and operable after such collection of water as the pool to disperse the water as a sheet of water over said floor . . ."

And that part, I understand you to say you haven't seen until you got down to the Sweet farm sometime early in 1963?

A That's right.

[97] Q The use of a tank for the purpose of holding water at a dairy installation —

A — pardon me, I am not following you. Is that number two?

Q No, I am not looking at the patent now, professor. The use of a tank for the purpose of holding water at a



dairy installation is, of itself, as a water trough or whatever purpose they wanted to collect water for is not new?

A No.

Q And neither are steel tanks or concrete tanks? They have long been used as troughs, have they not?

A Yes, for drinking water

Q For drinking water?

A Yes.

Q And some of them have sizes equal to sizes of tanks which are used in this instance at that Sweet installation you were talking about?

A Could be.

Q Now if you wash the floor by whatever means, either the water should be introduced at the upper end of a floor that has some slope or grade to it, should it not — I am not talking about from a tank, I am talking about from any means?

A Will you repeat that question again?

Q Let me re-state it.

If you are going to wash a dairy barn floor off by whatever means the water is introduced, you need to have a floor that slopes [98] so the water will be carried away to the drain, do you not?

A Yes, indeed, sloped to carry away the water.

* * * *

## [46] DEFENDANT'S MOTION FOR A NEW TRIAL

[Title Omitted in Printing]

Filed: Jul. 27, 1973

Comes now BERNARD A. SAKRAIDA, Defendant herein, and moves the Court to grant him a new trial herein, and as grounds therefor says:

1. This cause was tried before this Honorable Court on the 13th day of September, 1971, following which on September 23, 1971, this Court entered a judgment for Defendant holding Patent No. 3,223,070 held by Plaintiff does not constitute invention, is not patentable, and is not a valid patent, it being a combination patent, all the elements of which are old in the dairy business, long prior to 1963, and the combination of them as described in said patent being neither new nor meeting the test of nonobviousness.

2. Plaintiff appealed from said judgment to the United States Court of Appeals, Fifth Circuit, which on February 5, 1973, entered its judgment holding said Patent No. 3,223,070 was valid.

3. Defendant, who was the Appellee in the said appeal, thereafter and in due time, filed his Petition for a Rehearing in the Court of Appeals, Fifth Circuit, one of the grounds therefor being newly discovered evidence, it being alleged in said Petition for Rehearing:



"Defendant-Appellee petitions for a rehearing, and prays the Court to remand the issue of the validity of the Gribble and Bennett patent to the Trial Court, on the ground of Defendant-Appellee's discovery of new evidence since the date of the entry of the Trial Court's judgment, and while this appeal has been pending, which new evidence shows that a floor washing means constructed to collect a pool of water uphill from or on the floor so that, when the water is abruptly released, it will flow as a sheet to wash almost instantly the barn floor area was designed, installed, and in operation prior to November 5, 1963, the date of filing of Plaintiff-Appellant's application for a patent. Such a system was designed by Herbert G. Meyer, of Carmel, California in 1962, and was installed by him in the Mission Dairy at Gonzales, California, the contract therefor having been let in September, 1962, with the said Mission Dairy Barn having been completed and in full operation in October, 1963, and which is still in operation at this date (1973).

The affidavit marked Exhibit "A", of Herbert G. Meyer, owner and operator of the Mission Dairy, Gonzales, California, to said facts is attached hereto and made a part hereof in support of this petition. Pictures of the gate, or dam, and of a part of the tank behind the gate or dam, and a picture of the surging flow of the water, when released, are attached to the said affidavit. The specific information about such a floor washing means being installed and used by Herbert G. Meyer at the Mission

Dairy, in 1962-1963, did not come to the attention or knowledge of Defendant-Appellee until January, 1973, when he was told of it by Herbert G. Meyer, as stated in said affidavit attached hereto. Defendant-Appellee says the said newly discovered evidence is material to the issue of use of a water-flush system, on a dairy barn floor, prior to the filing of the application for the Gribble and Bennett patent, and that Defendant-Appellee should be entitled to place evidence concerning same before the Court in order that all relevant facts be made known to the Court for its consideration, and that justice may be done. He therefore prays this Honorable Court to remand to the Trial Court the issue of the validity of the said patent. Since the case is being remanded to the Trial Court on the question of infringement, the cause of justice and the rights of Defendant-Appellee will best be served by remanding both issues to the Trial Court."

4. A copy of the said affidavit of Herbert G. Meyer is attached hereto.

5. A copy of the affidavit of Defendant Bernard A. Sakraida, and a copy of a telegram from Frank F. Souza, dated March 27, 1973, which were attached to Defendant-Appellee's response to Plaintiff-Appellant's reply to the Petition for a Rehearing are also attached hereto.

6. The Court of Appeals, Fifth Circuit, by its Order dated June 25, 1973, remanded this cause to the District



Court, with directions to enter a judgment holding the patent valid, subject, however, to the District Court's consideration of a motion under Rule 60(b)(2) F.R.Civ.P., to be filed in the District Court by the Defendant Sakraida on the issue of patent validity based on newly discovered evidence. It is further directed that the District Court will hear and determine said motion before proceeding on the issue of infringement, and that the District Court will then certify to the Court of Appeals the entire record, including its opinion and order and the testimony taken on the new trial issue.

7. Defendant Bernard A. Sakraida here moves the Court to grant him a new trial, and to grant him a hearing in connection therewith, for the purpose of hearing newly discovered evidence, along the lines indicated in the affidavit of H.G. Meyer and in the telegram of Frank F. Souza, by hearing testimony from H.G. Meyer, Frank F. Souza, Emil Rovey, Chester Whitmore, Dick Ripley and others, along the lines generally indicated, but not limited to them, in the affidavit of H.G. Meyer and the telegram from Frank F. Souza attached hereto.

8. Defendant Bernard A. Sakraida prays the Court that upon hearing such new and additional evidence, the Court hold the said Patent No. 3,223,070 invalid on the grounds that it does not constitute invention, is not patentable, and is not a valid patent, it being a combination patent all of the elements of which are old in the dairy business, long prior to 1963, and the combination of them as described in said patent being neither new nor meeting the test of non-obviousness.

/s/ J. F. HULSE
J. F. HULSE

/s/ STEPHEN B. TATEM, JR.
STEPHEN B. TATEM, JR.

Attorneys for Defendant

SCOTT, HULSE, MARSHALL
& FEUILLE
11-D El Paso Nat. Bank Bldg.
El Paso, Texas 79901

[Certificate Omitted in Printing]

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Exhibit A

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

AFFIDAVIT OF HERBERT G. MEYER

Before me, a Notary Public in and for said County and State, on this day personally appeared HERBERT G. MEYER who, having been by me first duly sworn, upon his oath deposed and said that he has personal knowledge of the facts herein set out.

I am forty-eight (48) years of age and graduated from the University of California with a B.S. degree in Mechanical Engineering in 1947. I presently reside at



Carmel, California. I am presently a member of the American Society of Agricultural Engineers and the American Society of Farm Managers and Rural Appraisers. Since 1962, I have owned and operated the Mission Dairy in Gonzales, California, which is a large, modern dairy that houses approximately 1400 head of dairy cattle, and operates by utilization of a twin milking parlor.

The Mission Dairy employs a modern, manure flush concept which, in essence, utilizes a flush concept wherein a large volume of water is stored as a pool on a cement floor behind a metal gate, thus forming a dam or storage tank. The large metal gate is operated by a hydraulic mechanism that allows the gate to suddenly be unlatched, thus falling to the floor and releasing the stored water as a wave to flow downhill. The surging action of the water as it flows downhill removes manure or droppings deposited on the cement floor as well as washing the hooves of cows.

I have attached to my Affidavit three photographs of my dairy barn at Gonzales, California, enclosed herein as Exhibits A, B and C. These photographs depict in detail the metal gate approximately 17 feet wide, approximately 2 feet wide and approximately 4 inches thick that serves to house the volume of water behind the gate. The gate is attached to the floor by a type of hinge mechanism that, when it is released, falls to a recessed position on the floor thus releasing the water stored behind the gate in a sheet to flow downhill, removing the manure deposited on the floor at the lower end of the modern dairy barn floor. Exhibit

B shows the gate elevated in place. Exhibit A shows the surging action of the water flowing downhill after the metal gate has been released. Exhibit C shows the portion of the floor of the modern dairy barn above the metal gate housing the stored water.

My purpose in installing the floodgate system was to wash away cow droppings on the floor as well as to clean the hooves of the cows standing in the holding area.

I, personally, designed the floor plan, flush system, holding tank and dairy construction employed at the Mission Dairy beginning in June of 1962. Contracts were let with Inland Steel for the construction of the dairy barn in September of 1962. Construction was then begun and the barn was ultimately completed and in full operation by October 1963, and is still in operation today.

I was first notified of the above pending lawsuit and personally met Mr. Bernard A. Sakraida on or about the 23rd day of January, 1973 while I was in the State of Florida on business. At that time I discussed the fact that I had built and had in operation since October 1963 a barn utilizing a manure flush system apparently identical to the one involved in the instant cause of action and discussed my barn plans and operation of same with Mr. Sakraida. Mr. Sakraida asked me as to whether or not I would bring such information with respect to my barn to the attention of the Court in this case. I agreed to cooperate.

Further affiant saith not.



EXECUTED this 13th day of February, 1973.

/s/ HERBERT G. MEYER
Herbert G. Meyer

Subscribed and sworn to before me this 13th day of February, 1973.

/s/ L. C. KENTON
Notary Public

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Exhibit C

THE STATE OF TEXAS
COUNTY OF EL PASO

BEFORE ME the undersigned authority on this 29th day of March, 1973 personally appeared BERNARD A. SAKRAIDA, who having been by me first duly sworn upon his oath deposed and said:

That not long prior to the trial date of the case in September, 1971, your affiant heard that there was or might be some kind of a manure flush system in operation at the Mission Dairy at Gonzales, California, the time it was installed being unknown, and just what kind of a flush system was being used was also unknown. In order to investigate same, your affiant, who was living and working in Florida at that time, as he still is, requested Mr. Aubrey Wisdom of Medford, Oregon, and who was conversant with the dairy business, to check at the Mission Dairy, and ascertain

what kind of a flush system, if any, they had, and how long it had been in use.

Some days later Mr. Wisdom reported back to your affiant that he had been to the Mission Dairy; that it was in charge of a manager by name of Dick Ripley, who refused to give any information about the Mission Dairy to Mr. Wisdom, with the statement that he did not want to get involved. That your affiant therefore did not receive any information about what kind of a floor cleaning system was in use at the Mission Dairy, and has never known or been advised by any definite information as to what floor cleaning system is used at the Mission, Dairy, or has been used there, or how long it has been used there, until he came in touch with Herbert G. Meyer, in Florida, in January 1973, who was there on other business. At this time Mr. Meyer, in a conversation with your affiant, advised him of facts set out in Mr. Meyer's affidavit attached to Appellee's Petition for a Rehearing in the case of *Ag Pro, Inc. vs. Bernard A. Sakraida*, now pending in the United States Court of Appeals, Fifth Circuit at New Orleans. This information from Mr. Meyer was the first actual evidentiary information which your affiant had with respect to the flush system in use at the Mission Dairy, or when it was installed there, and when it began operation.

Affiant says that this is newly discovered evidence to him, because although he had heard that there might be something of the kind at the Mission Dairy, on making inquiry at said dairy, the manager thereof refused to give affiant's representative any information whatsoever, and your affiant was unable to learn what kind of a flush system was in use at the Mission



Dairy, or how long it had been in use there, or to obtain any other information about it.

Affiant further says it is his understanding that Ag Pro, Inc. has never instituted any legal proceedings against the Mission Dairy for alleged infringement of the patent claimed by Ag Pro, Inc., which indicates Ag Pro, Inc. knows the Mission Dairy flush system antidates its patent.

Affiant further says he had no knowledge of the water flush installations referred to in Frank F. Souza's telegram attached hereto prior to March 27, 1973.

FURTHER AFFIANT SAYETH NOT.

/s/ BERNARD A. SAKRAIDA
BERNARD A. SAKRAIDA

SUBSCRIBED AND SWORN TO before me this 29 day of March, 1973.

/s/ RUTH J. WALDREP
Notary Public in and for El Paso County, Texas

My Commission Expires:
June 1, 1973

Exhibit D

WESTERN UNION TELEGRAM

EPA194(1844) (1-031063C086) PD 03/27/73 1844
ICS IPMSFSD SFO
ZCZC 04235 TURLOCK CA 114 03-27 332P PST
PMS SCOTT HULSE MARSHALL FEUILLE, DLR
ATTN STEVE TATEM 11TH DLOOR EL PASO NATL BANK BLDG
EL PASO TX 79912
FRANK F. SOUZA., BLDG. CONTR., 28 YEARS EXPERIENCE IN DAIRY CONSTRUCTION AND DEVELOPEMENT HAS USED WATER-FLUSHING METHODS SINCE 1946 FOR CLEANUP AND LABOR-REDUCTION IN IN DAIRY INSTALLATIONS. ORIGINAL INSTALLATION BEING ON HARRY SOUZA RANCH, BRADBURY AND BLAKER ROADS, TURLOCK CALIF. IN 1946, USING THE WIER/BOARD SYSTEM, WHEREBY WATER IN DAMMED BY USE OF WIER/BOARDS, AND RELEASED WHEN SUFFICIENTLY ACCUMULATED, TO FLUSH OR WASH-DOWN CONCRETE CORRALS AND LANES. ANOTHER INSTALLATION WAS INSTALLED IN 1949 AT FRANK MACHADO DAIRY AT 26234 SOUTH UNION RD MANTECA CALIF AND AGAIN IN 1950 AT HOFFMAN RANCH MANTECA CLAIF. THESE HAVE SINCE BEEN FOLLOWED BY MANY OTHER INSTALLATIONS, UTILIZING THE SAME WATER/FLUSH SYSTEMS. RESPECTFULLY YOURS FRANK F SOUZA INC PRESIDENT



[51] DEPOSITION OF W. C. FAIRBANK

[Title Omitted in Printing]

Filed: Sep. 17, 1973

* * * *

[4] ONTARIO, CALIFORNIA,
THURSDAY, AUGUST 16, 1973
1:30 P.M.

W. C. FAIRBANK

The examination of the deponent, called as a witness by and on behalf of the plaintiff, pursuant to the provisions of the Code of Civil Procedure, State of California, after being first duly sworn by the Notary Public to testify to the truth, the whole truth, and nothing but the truth; and after entering into the usual stipulations, the witness was deposed and testified as follows:

EXAMINATION

BY MR. KOLISCH:

Q Will you please identify yourself, Mr. Fairbank, with respect to your residence and occupation.

A I am Extension Agricultural Engineer with the Agricultural Extension Service, University of California. My office is at the University of California, Riverside Campus. I reside at 2835 Iron Hills Way, Riverside.

Is that all right or do you want —

Q Yes, that is a sufficient explanation. Will you give us briefly your educational and professional background.

A I am a graduate agricultural engineer from the University of California, 1950; I have been — after graduation I — or since graduation I have been with the International Harvester Company, the pineapple division of Hawaii, Food [5] Machinery Corporation, a food and vegetable cannery engineer, and I joined the Agricultural Extension Service in 1958 with primary responsibilities ever since in the area of lifestock mechanization and related matters.

Q Can you —

A Oh, I might add to this.

Q Yes.

A I am a past officer in the United States Agricultural Engineers and hold committee appointments in that professional society.

Q How long have you been located in the Riverside area professionally?

A July; since July, 1965.

Q And where were you before that?

A Officed on the Davis Campus of the University of California.

Q And that was commencing in 1958 then?

A Approximately. There was a period of time there when I was out of the County adjacent to Davis but actually moved onto campus in — 1960, I think.

Q You are talking about the Davis Campus?

A Yes.

* * * *



[6] Q BY MR. KOLISCH: Well, I would like to have the best date that you can give me as to when you were first contacted by anyone connected with it.

A Well, let me see. I think — I think the first contact was by telephone, though I can't attest to that. The first communication I see here is in June of '69. Let me see. Letter from Mr. Hulse dated June 24, '69. Yes, that seems to be the introductory communication.

Q And now you are referring to your file which you have kept on this matter, I take it, is what you are referring to? Is this what you are referring to?

A Yes. If I —

Q To use with —

A I am referring now to my chronological file on this general subject of —

Q All right. May I see the letter that you are [7] referring to?

I take it that you want to keep this file?

A Yes.

Q I will simply read into the record a letter dated June 24, 1969, addressed to Mr. Fairbanks at the Agricultural Engineering Department, University of California, Riverside, and the letter reads as follows: "Dear Mr. Fairbanks, I represent Bernard Sakraida in the patent infringement suit brought by Ag Pro, Incorporated. I understand you are familiar with Ag Pro and with Mr. Gribble who seems to be the president of that company.

"Mr. Sakraida tells me that you have information which would be of great help to us in our lawsuit. From my conversations with Mr. Sakraida, I assume the information which would help us and which you could give us is along the line of flushing systems more or less similar to the one patented by Ag Pro but have been in use prior to the time of said patent. If you will

telephone me collect so that I could talk to you about it over the telephone, I will greatly appreciate it. Very truly yours, Scott, Hulse, Marshall and Feuille, F-e-u-i-l-l-e, signed J. F. Hulse."

That refers to conversations that you had with Mr. Sakraida. Were those as you recall now?

A I honestly don't recall because at that time I didn't realize there was any pending litigation, and I am sure when he called me the — I am sure I kept no record of all this. If I did, it would be in my file, but I am almost certain I kept no notes on that conversation.

[8] Q And at the present time you don't have any recollection of what the conversation would have been?

A It would have been relative to the oncoming litigation, I am sure, but beyond that — that is — I have no recollection.

MR. HULSE:

May I interject? The conversation with whom, Mr. Fairbank?

THE WITNESS:

Pardon?

MR. HULSE:

That is the conversation with whom?

THE WITNESS:

I presume Mr. Sakraida, because I do not have any recollection yet it has been referred to in this correspondence, and I am sure that I have just a very vague recollection, yes, of having had a contact with Mr. Sakraida, but at this late point in time apparently I



have no — no notes taken on that conversation. Probably on my blotter pad and — no, I have no —

Q BY MR. KOLISCH: Subsequent —

A — note or specific recollection of that conversation.

Q After you received this letter from Mr. Hulse, did you then telephone Mr. Hulse?

A I can only say I presume I did. I had some such telephone conversations with Mr. Hulse, but I don't know if it was as a result of that letter or some other act. I do know I had a telephone conversation with him somewhere along the line — with Mr. Hulse, unless I can — I had it here in the file — shortly afterwards or maybe a letter where — maybe, I don't know.

[9] Q Will you tell us now what the substance of that telephone conversation was and give me the best date that you can.

A It would have been in the fall of what? '69? Was that what it was? No, '68. What was it?

Q It was '69.

A Okay. It would have been approximately the time of this — these — this correspondence, that is all I can say.

MR. KOLISCH:

Off the record.

(Off the record discussion.)

THE WITNESS:

Some place in that period of time there was a letter, and all I can say is one or more telephone calls, but I kept no records because I had no anticipation of what this was going to result in as far as content. I generally

outlined my experience of having seen the general principle of manure flush-out and the use of flowing water for cleaning dairy barns.

Q BY MR. KOLISCH: Now, I note that on July 27, you sent Mr. Hulse a letter. June 27, 1969, and it went as follows: "Dear Mr. Hulse, this is in answer to your letter of June 24, the patent infringement suit brought against Mr. Bernard Sakraida by Ag Pro, Incorporated.

"Rather than try to sift through my files for specific details, I have chosen to send you the complete letter file which seems relevant (am enclosing 21 letters). As you can see, I have been involved directly in this situation since 1966 and have certainly had an acquaintance with the concept [10] of flushing going back to 1960 or before. Please return the enclosed file at your earliest convenience. I shall be glad to discuss any specific question you might have, so feel free to contact me in this regard."

And I take it you did send this material to Mr. Hulse?

A Uh-huh.

Q And then subsequently was it returned to you?

A Uh-huh.

Q Now, what I would like you now to state, in as much detail as you can, what was said in conversations between you and Mr. Hulse over the telephone with regard to this subject matter.

A I know that I discussed a meeting that I and the late Dr. Larry Borne, of the University of California — and someone else in the University — had with Mr. Gribble and Mr. Bennett at the — at their office, which was — or rather I should say at their construction office which was at the Piney Hills West Dairy, Calistoga, California.



Well, I can get — I have — we were, the three of us from the University with — called over to discuss liquid dairy waste handling systems with Mr. Gribble, who was introduced as a young agricultural engineer from the State of Oregon with seemingly some new concepts for dairy waste handling, and Mr. Gribble was seeking from us technical assistance relative to the pumping and distribution of liquid dairy waste.

Now, I believe I may have some notes in there giving more specifics. Okay, but I know that that meeting at Mr. [11] Gribble's office was discussed with Mr. Hulse, or his agent, and — at or about that time, or maybe I should say at that time or shortly following I mentioned to Mr. Hulse or Mr. Sakraida the Mission Dairy in Gonzales, California, owned — let me see — owned and operated by Mr. Herb Meyer, because that dairy was under construction at the time of the Ag Pro — at the time of our discussion. At or approximately the time of our discussion with Ag Pro, and the Mission Dairy embodied manure flush principles which later appeared in the Ag Pro patent.

Q Now, what was the date of that telephone conversation? You said it was either with Mr. Hulse or Mr. Sakraida.

A Yes, I had contacts with both of those gentlemen about that period of time and I can't now identify them.

Q Well —

A There may be some recollection — or there may be some reference in there but other than that I can't identify them.

Q Was it prior to October 13, 1969, which is the date of your first affidavit?

A I think so. I can't give an affirmative — I think probably so, but — no definite recollection.

Q But anyway your recollection is that it was at or about the time that you were having your first telephone discussions with Mr. Hulse and Mr. Sakraida?

A It was in that same general time period, yes. See, the trouble is I had phone calls — I should say some phone calls from Mr. Hulse and Mr. Sakraida, I do not know how many times [12] with either nor the number of times. I know that whether it was one or two, or two and one, and which came first, I have no recollection of that.

Q But you do remember telling them at that time about the Mission Dairy? Telling one or the other —

A Yes.

Q — about the Mission Dairy?

A No, I can't see as — that is the trouble. I have no way at this time of knowing which one of the gentlemen from Texas, or — or represented by Mr. Hulse's interests — which one was interested — which one — I mean, interested in what way.

Q Let me show you a Xerox of an affidavit and see if you can identify it.

A Let's see. Oh, yes. Okay. Now, see, as I was giving a previous answer I hadn't been reading this, perhaps this gives those dates. Let's see. Let's see. Yes. Okay. This is — yes, I would still — I wrote this and I would —

MR. HULSE:

May I see it?

THE WITNESS:

— not change my comments.



(Whereupon the Xerox copy of the affidavit was marked by the Court Reporter as Plaintiff's Exhibit No. 1 for Identification.)

Q BY MR. KOLISCH: I take it Exhibit 1 was the result of revisions between you and Mr. Hulse; is that correct?

A Uh-huh.

Q In looking through your file I see that there were [13] about two or three drafts, exchanges between you.

A Uh-huh, yes.

Q Mr. Fairbank, this is the first opportunity we have had to look at this file —

A No, sir. Your partner came down and looked at the whole file.

Q What was his name? Mr. Tatum?

A No, somebody came down from the northwest. Oh, I have got it in here.

Q Oh, Mr. Stewart?

A Mr. Stewart. He went through the whole file.

Q Mr. Stewart went through this (indicating), you are right, at the time that he brought you a copy of the second affidavit; do you remember?

A Yes, yes.

Q All right, fine. Would it be possible to get copies of any of these documents if we find it necessary?

A I think so.

Q Those which would be of interest to the court and they are not —

A Well —

Q — I don't intend to pry into anything.

A — some types of documents that I — administrator and my co-workers.

Q I am not interested in getting into your personal matters; anything that is unrelated to this matter, and you could go through there, if we wanted to look at this, and exclude anything.

[14] A Sure. I would — most of our work, as public servants, is public information and there is nothing exclusive or confidential about it.

Q You mentioned a Meyer, Mission Dairy ranch in Gonzales, California. When did you first become aware of that dairy?

A Approximately the same time I became aware of the Piney Hills West Dairy which was being engineered by Mr. Gribble. Now, by approximately the same time, I mean within — within several weeks one way or the other but I am not sure that I can —

Q My information is that the Piney Hills Dairy was built in 1963.

A Well, I can verify that. Okay, Piney Hills is November, '63. All right. Okay. Here we are. Okay. The Piney Hills Dairy was under construction in '63, and I would have to go back to my diary, which I did not bring, which actually gives us specific dates on there. December 2, '63. Mr. Borne, Mr. Harwood, and I visited the new Piney Hills Dairy, Calistoga, and met Mr. Joe Shaffer, and Mr. — probably Gribble and Bennett. That was December of '63, is when I was first on the Piney Hills Dairy.

Q And that dairy was operative at that time?

A I don't think it was. It was brand new, and they were just within a few days one way or the other in starting to milk at the dairy. It wasn't completed yet, but they were getting — they had brought in a few cows and — I mean, it was right there, was essentially going to start milking, but [15] I didn't think they had milked any yet.



Q And did you examine the manure flush system?

A No, because it was not yet installed at that date because at that time Mr. Gribble asked the three of us, Mr. Harwood, a farm advisor from Sonoma County; Mr. Borne, a former University specialist on irrigation and drainage and water handling equipment; and myself, Extension Engineer, technical details on — and Dr. Hare I think was on that trip — well, anyway, technical details about pumps, piping, manure sprinkler nozzles, et cetera, and it was at the official opening of the Piney Hills Dairy that I first saw the flush out system in its — essentially in its entirety.

Q When?

A You asked me about the Piney Hills —

Q About the Mission Dairy. Does that refresh your recollection with respect to Mission Dairy?

A I thought I saw something in there. Oh, I saw the dam arrangement at the dairy, at Mission Dairy, Gonzales, at 7/23/63. Seven is July, isn't it?

Q Yes.

A Yes, on seven — July 23 of 1963. So, I saw the dam arrangement at Mission Dairy, yes, five months prior to the examination of the dam at the Piney Hills West Dairy.

Q And was the flush system operative at the Mission Dairy?

A On that date? I don't know because the new dairy barn was under construction. Part of it was in use; part of it was not in use on that date, and I don't know whether that [16] particular flush system was or was not operating at that time. Certainly it was installed to the extent that — I saw how it was to function, but whether or not it was operative, I cannot say.

Q Yes. What is the first date that you can recollect

when you saw the Mission Dairy flush system operative?

A I have no recollection for dates on that because at some later time, perhaps weeks, conceivably up to a month or even six weeks it was before I was back in that area and I do not have that information in this file.

Q It would be a matter of a few months then; was it probably sometime later in 1963? Just give me your best idea.

A I am sure it was operating within — within several weeks of the date I first saw it under installation.

Q You said you are sure it was operating; I would like to have your best recollection as to when you saw it. How often were you going back to this dairy?

A Oh, let's see. It was sometime later in that — it was either later in that summer or the — or the fall — the fall, a few months later, but I cannot answer that question. I would have to go back and dig out my diaries and hope I — I had some diary entry. I was traveling all of central California dairies consistently; I was state-wide then as I am now, and I had frequent visits to Monterey County, where this dairy was located, and I don't have that information here, though, the dates.

Q Would it be correct to say that you had probably seen the Mission Dairy in operation by the end of 1963? I [17] am talking now about the manure flush system.

A Yes.

Q And would it be correct to say that by the end of 1963, you were aware of the similarities between the Mission Dairy flush system and that of the Piney Hills West Dairy, as representing the Ag Pro system?

A Yes.

Q Now, jumping forward to the discussion on the telephone that you had either with Mr. Hulse or with



Mr. Sakraida in 1969, and I take it it was at some time before you signed Exhibit 1, which was October 13, 1969 —

A Wait a minute. What was the question now?

Q I haven't gotten to the question. The question now is: Going to the time when you had your discussions with either Mr. Hulse or Mr. Sakraida with respect to the Mission Dairy, you were at that time fully aware of the similarities between the Mission Dairy and the Ag Pro system?

A Definitely.

Q And you testified that you mentioned that to either Mr. Hulse or Mr. Sakraida?

A Yes.

Q What was their reaction, or his reaction, whoever it was, when you told him about that?

A It was indicated to me by either Mr. Sakraida or Mr. Hulse that Mr. Sakraida made occasional trips to California and would follow up on my suggestion of — of what? Inspecting or observing the Mission Dairy.

Q Looking into the Mission Dairy?

[18] A Looking into the matter, yes.

Q Did you get any indication from either of these gentlemen, Mr. Hulse or Mr. Sakraida, that they knew about the Mission Dairy?

A I got an indication somewhere along the line that one or the other of these gentlemen had heard the term Mission Dairy but they seemed unknowledgeable beyond only having heard mention of it.

Q Do you recall approximately the size of Mission Dairy?

A Many hundreds of cows.

Q Was it classified as a big dairy?

A It would be classified as either a medium large or a large dairy. The number seven hundred cows at this

time sticks in my mind, but at that time it was an old dairy being modernized, so it was in an expansion. It was an expansion situation, so I don't know what it expanded from to.

Q You are talking now about the period 1963-4 at the dairy?

A 1963. At this point when I saw — it was July of '63, it was in a modernization expansion program.

Q And it might have been a seven hundred cow dairy at that time going to a larger dairy?

A I don't think so; I think it was a hundred and fifty to two hundred fifty cows, in that general range, going to upwards towards seven hundred was my — is my recollection.

Q At the time that you visited or the first visits that you made to the Mission Dairy after it had its manure [19] flush system, were you ever restricted or refused admission to the dairy?

A I was certainly never refused admission; restriction — I will not answer. Sometimes when we go to a dairy we are asked — led away from certain things, but we saw so many portions of that dairy that I can't say whether I was or was not. I don't — I want to say I don't think so, but I have no certainty.

Q If I understand you correctly, you do not have any present recollection as to whether or not any portions of the dairy were or were not restricted from your viewing; is that correct? You really don't remember?

A That is correct. I should withdraw that statement because now I do remember that at the first time we saw that dairy they showed us all of their new innovated systems including some innovations in the milking parlor, and because they were proudly showing us innovations it would be my presumption now



that they certainly did not — that there was no subsequent restriction because it was a show place dairy.

Q Is it correct to say then that as far as the manure flush system is concerned you were not denied any access or viewing of it?

A That is correct.

Q And as far as any of your subsequent visits to the dairy, were you ever denied any viewing of this manure flushing system or were you aware that anyone was ever denied any access to it?

A No, sir, to both parts of that question.

[20] Q You mentioned that you inspected certain milking parlor equipment which had been or was being installed in '63 of the Mission Dairy; do you recall if the Ross-Holm Company was the manufacturer of any of that equipment?

A I don't recall; I have no recollection.

Q On any subsequent visits to the Mission Dairy, have you had occasion to look at the milking parlor equipment?

A Not specifically.

Q And if I were to ask you now whose equipment is at the Mission Dairy, could you tell me?

A No.

Q Do you know a Dick Ripley who was connected with the Mission Dairy?

A Only casually.

Q And what do you know of Mr. Ripley as far as his connection with the Mission Dairy?

A I have met him on the premises and I — I presume — I am led to believe that he is — he is in a supervisorial position; whether it is as superintendent, herdsman, manager of the dairy, I do not know. It is probably one of those categories.

Q Did he ever have anything to do with the making

available, access to you of various parts of the dairy for visitation or looking? Did he have any connection with that?

A I have no recollection.

Q Do you recall whether Mr. Ripley was at the Mission Dairy at the time that you made your first visits and there was the new manure flush system?

[21] A I have no recollection.

Q Have you ever discussed with any of the Mission Dairy personnel and flush system that was installed from your observations sometime in 1963?

A No, sir.

Q At the time of your first visit, do you recall the names of any Mission Dairy personnel who accompanied you in your visit around the facility?

A No, sir. The only name I can attach at that — in 1963 would have been Herb Meyer.

Q You mentioned that the Mission Dairy was going through an expansion and was adding on to the dairy as well as getting new and somewhat different equipment; you also mentioned that they were using it as a show place. Could you explain to us a little more what you mean by that?

A A few months, perhaps — perhaps as much as a year or more prior to my seeing the dairy in '63, Mr. Meyer was in my office in Davis and indicated that he had fallen — that he had either fallen heir to the Mission Dairy through a family — through a family estate or was purchasing, I guess would be the term, the Mission Dairy from its previous ownership and he had great — he held great future in the dairy industry in Monterey County and wished to make the Mission Dairy a viable show place of dairying for the Monterey Valley. That was my first acquaintance with Mr.



Meyer and the Mission Dairy. Then when I saw the dairy first, when I saw the Mission Dairy then under — the modernization program under way —

Q Let me interrupt you for a second; did you go to

[22] the dairy prior to the modernization program?

A No.

Q All right.

A When I saw the dairy in July of '63, they had already erected a very attractive fence along Highway — U.S. 101, and with upgrading the general appearance of the dairy of the entire dairy facility.

Now, did I answer the question or did I lose my train of thought?

Q I think you have answered it. I would like to ask you this: The modernization of Mission Dairy, and let's say its whereabouts in its operation, is this something that was pretty well known to people in the dairy industry in the California area? Now, I do not know how or whether you divide the northern and southern, but I would like to get your information with respect to how well known this became among people who are knowledgeable in dairy industry.

A To my knowledge, the former Mission Dairy was not probably known outside of the county or the nearby area.

Q What is the county?

A Monterey County.

Q Thank you.

A And upon my first meeting with Mr. Meyer, we were told — I was told, pardon me, the Mission Dairy was very run down and was under threat from the State Bureau of Dairy Services of losing Grade A certification.

Mr. Meyer, through a family trust or estate situation, had to make the determination or had to choose

[23] the alternative of abandoning the old Mission Dairy or modernization and rebuilding; he chose the latter, and as I recall now there were originally two — either two herds or two barns in the original earlier Mission Dairy, and he chose to consolidate it into the one large modern facility or modernized facility.

Q Did the modernization of the Mission Dairy receive publicity within the agricultural industry?

A As I recall, it received considerable publicity in Monterey County and was acknowledged in various agricultural and/or dairy publications; but Monterey County is not a major milk producing county so as — so neither the dairy community — I should say to the dairy community of that area it received clearly statewide attention.

Q Do you have any recollection that there was any opening, public opening or announcement in connection with the Mission Dairy after they had completed the modernization that you have been talking about?

A I don't recall any open house or public display.

Q Later, and this is after the Mission Dairy had been in operation and its modernization, did it become better known in the California dairy community? Better than the previous Mission Dairy?

A Yes, yes.

Q At the time that it was modernized, to your knowledge, where would the Mission Dairy have ranked among California dairies with respect to modernization?

A I cannot say because I did not see the former — [24] the former dairy; I only heard descriptions of it.

Q I am only talking about the modernized Mission Dairy as compared to other dairies in the California area with which you are familiar; was it one of the



most modern? Or was it less? Where would it rank with respect to its —

A After the modernization, do you mean?

Q Yes. I am only talking about the modernized version as compared to other dairies at that time.

A At that time the milking area and the corral system would be much more modern than the average California dairy at that time because they had extensive use of steel and concrete construction as compared to much earthern and timber construction on the average California dairy at that time. They also put in innovations in the milking parlor including comfort features for the cows and milker and the innovative manure handling system.

Q And in your opinion was the manure handling system an innovative one?

A I am at a loss here to know how to define that innovative. I myself used it.

Q I used the term because you used it.

A Innovative in terms of what the average waste handling system was on the California dairy. It was also innovative in that it had — it integrated the wate handling system with the crop irrigation fertilization system on the Mission Dairy because the Mission Dairy is only part or a land holding of a very large land holding that was in vegetable crop production and forage — forage production. The [25] Mission Dairy was integrated with crop production and an irrigation system.

Q Would it be correct to say that the only other manure handling system like it with which you were familiar at that time was at the Piney Hills Dairy?

A I could not make that statement because there were many dairies in California who had integrated

waste handling crop production systems but perhaps not with the same embellishment as that dairy.

Q I am not talking about the manure flush system per se, but water collected, pooled and dammed and then subsequently released to wash all this; did you know of any other dairy that had such a manure flush system?

A Well, not the combination of an instant flow of water, a flush system, a collection basin and an intensively farmed — or intensive crop land area; no, I do not know of any other combination of those elements.

Q Do you recall that in March of 1973, I telephoned you concerning the Mission Dairy and as a result of the telephone conversation you prepared or you signed another affidavit, and I will show you the document which I would like to have marked as Exhibit 2.

(Whereupon the Xerox copy of the affidavit was marked by the Court Reporter as Plaintiff's Exhibit No. 2 for Identification.)

THE WITNESS:

Yes, I recognize it.

Q BY MR. KOLISCH:

And it is your signature?

A Yes.

[26] MR. HULSE:

Let me take a look at it.

Q BY MR. KOLISCH: And is Exhibit 2 factually correct?

A Yes, it is essentially factually correct, yes.

Q I think you were provided a copy of that at the time that you signed it?



A Yes, I was just looking now to see if there were any statements —

A Why don't you read it over and see if there are any statements in there that you would want to correct or change.

A Yes, I wouldn't change it.

* * * *

[27] EXAMINATION

BY MR. HULSE:

Q Mr. Fairbank, in the early part of your testimony here this afternoon when Mr. Kolisch asked you about your having telephone conversations with me or somebody representing Mr. Sakraida in 1969, and you were asked relative to saying anything to whoever it was you were talking to about the Mission Dairy, I believe you said that you thought you had a telephone conversation either with me or with Mr. Sakraida and you could [28] not remember which one; and that is still the case, isn't it?

A Yes, sir.

Q You can't remember which one?

A No, sir.

Q Well, then, to that extent is not this affidavit that you gave Mr. Kolisch on the 13th day of March, 1973, where you specified me, at variance with your recollection?

A Not necessarily because there are some periods of months that have gone by plus some additional questions and discussion has come up now that has tended to — tended to confuse certain recollections.

Q Well, it is true, isn't it, Mr. Fairbank, in trying to

call exactly what was said in various conversations you may have had with a person, or with several persons three or four years ago, it is not easy to remember, is it?

A Certainly some things stand out more clearly in our minds than others, and I think I have indicated when there was doubt in my mind and when there was no doubt in my mind. I don't know if I have answered your question.

Q Well, let me go back because I do not believe you gave me a direct answer to the question that I asked about.

You have just reconfirmed your statement that you couldn't remember whether the telephone conversation that you think you recall was with me or was with Mr. Sakraida.

A At this time I am recalling perhaps three telephone conversations; I cannot "singulate" them out.

Q With whom?

A With you, or Mr. Sakraida, or either of your agents [29] whom I may or may not have talked to. I don't know if my —

Q Well, who would the agents have been by name? Can you name anybody?

A No, I cannot name any names.

Q Because you don't know of anybody?

A Well, all right then, I said that because I don't know — I know that I had several conversations with you and/or with Mr. Sakraida and if it were your agent it would be your law partner or some party connected with Mr. Sakraida; I do not have any name, though, to offer in that regard.

Q And so it is your testimony here that you think



you told either me or Mr. Sakraida that there was a flush system up at the Mission Dairy?

A Read that question back.

(Record read.)

THE WITNESS:

I would say yes to that.

Q BY MR. HULSE: Well, your present recollection is you would not be able to say whether it was Mr. Sakraida or me to whom you were talking when you so stated?

A Well, that question is out of context because I don't know what specifically the telephone conversation is that is being alluded to here; I don't know which of the telephone conversations it was in reference to without starting this over very clearly.

Q Well, let me ask you this about your recollection: Any telephone conversations that you had with me were relatively short, were they not?

A Yes.

[30] Q In the neighborhood of five minutes or something like that?

A I think so.

Q We never had any extended telephone conversations, did we?

A No, sir.

Q And you do not actually have a specific recollection of just what you did tell me, at least in any telephone conversation, do you?

A No, sir. I would call to the attention here that on the bottom of my affidavit of — what? The 13th, March, I referred to telephone conversations in the plural, and my memory is refreshed now to the extent that in telephone conversations, plural, without referring to

a specific telephone conversation, I do not recall mentioning the Mission Dairy to you, because to my recollection I mentioned it to you at some point in time before that. I remember mentioning it to both you and Mr. Sakraida, but I do not know at which relative sequence.

Q Well, let me ask you this now: You have said in answer to questions by Mr. Kolisch something about that the system that was there at the Mission Dairy is a water flush system having some similarity to that covered by this Ag Pro patent; is that correct?

A Yes.

Q And did you mean by that that it had a dam for impounding water on the floor of the dairy?

A Yes, and the essential or the important feature [31] was of a — a relatively rapid flowing of a large volume of water.

Q Well, I do not like to belabor this, Mr. Fairbank, but I do want to get this right. You wrote me a letter on October the 8th, 1969, about that, didn't you?

A Did I? October 8, '69? Yes, sir.

Q And you said there that you could not cite me the use of a tilt bucket or a dam for impounding water on the floor, didn't you?

A Oh, what was that in reference to, however? Let's see. That is right, what I said.

Q And as a result of that, when this affidavit was signed by you, this Exhibit 1 that you have here, the affidavit that you signed dated the 13th day of October, 1969, you did not refer to the Mission Dairy, did you?

A I did not refer to the Mission Dairy here? Let me see. This was —



MR. KOLISCH:

October 13, 1969.

THE WITNESS:

October 13, after this letter; no, I did not.

Q BY MR. HULSE: And the essence of your letter of October the 8th, that the only places that you can cite me about flowing water to clean a barn floor is that of Weed, Lodi, and Bishop, and that was the ones mentioned in your affidavit.

Just look back at your letter of October the 8th, and that is correct, isn't it?

A Yes, sir.

[32] Q And that is what you told me in writing and that is what you told me on the telephone, isn't it?

A Yes, sir.

Q You did not say anything about the Mission Dairy, did you?

A No, sir.

* * * *

Q When I asked you if you did not tell me in the telephone conversation when you called me back on March 27, 1973, after you had looked at your copy of this letter of October 8, 1969, and say that you could not say that you had said anything to me about the Mission Dairy?

A If I understand the question correctly, I would not [33] agree because in my phone call to you on the 27th, I have it noted here that the Mission Dairy was presumably mentioned in one or more of the twenty-one letters mailed to Hulse, June 27 of '69, but that was a — not of our telephone conversation, at or after the

telephone conversation, and I — personally can't attach great significance to it; it is just a log of the telephone conversation, really.

* * * *

[34] THE WITNESS:

This is the one that was — let's see, October 8, '69. Okay. Yes, this was to my knowledge at this time, at the time of this letter — let's see. This was the affidavit of — excuse me, the 13th of '69. Let's see, does that say Weed, Lodi, and Bishop? Yes, yes.

[35] Q And if you told me over the telephone you sure told me different in writing in that letter, didn't you? About the Mission Dairy. That you said you could not cite any other places?

A I think the — I am a little bit here — I see part of the problem in that a citation is one thing mentioned in passing, or a casual allusion to something I would consider something rather different than a specific citation.

Q Well, I suggest to you that somebody came down and talked you into giving this affidavit and got you kind of in a box as compared to that first affidavit and that letter of October the 8th, didn't they, Mr. Fairbank?

A I do not think so, but —

Q Well, I am not boing to labor it any further.

A This correspondence, these affidavits are all to the best of my —

Q I would assume that; I don't attach anything else to it, but we get back to the point that one's recollection is necessarily not always exact, is it?

A I will agree with that.



Q And it is also possible that there can be errors in one's recollection?

A Certainly the Bishop, Lodi, and Weed situation, or installations were the only ones I could attach names, dates, and precise detail to. My notes on the Mission Dairy are accurate; I have got diary records at the office on those visitations. Just things about the water flush system in the dairy business generally.

[36] Q Mr. Fairbank, water flush systems of one kind or another to clean a dairy barn floor are old in the dairy business, are they not?

A I think the Hal Higgins' collection at Davis has reference back probably to the turn of the century or earlier on it.

Q Hal Higgins does?

A Yes.

Q I did not know that.

A He has the most complete library on dairy mechanization in the country; it has been given or sold to the University of California.

Q And where is Mr. Higgins?

A Mr. Higgins?

Q Do you know his address or where he lives?

A Yes, Mr. Higgins resides at Woodland, California, in a convalescent home.

Q Is he retired?

A He is retired. He is about ninety years old and is in failing health.

Q And this collection he had has been sold to whom?

A University of California.

Q At Berkeley?

A Davis. At Davis. It is housed in — now it is in the general library and is referred to as the Hal Higgins — Hal Higgins' collection —

Q Oh, I see.

A — on agricultural mechanization; it is the most [37] complete agricultural mechanization library, apparently, in the country.

Q Does anyone in particular have charge of it or just the library generally?

A There is a specific librarian in charge of it. Mr. Higgins is still of sound mind but he had to have a limb amputated recently and he still is — he still gets around out in the field when he is able; and he is still of sound mind and he always likes to talk about this topic, and certainly he — if you go visit him, as I did in this matter several years ago —

Q I am not familiar with California; where is Davis?

A Fourteen miles west of Sacramento. Sacramento is essentially in the —

Q I know where Sacramento is.

A Now, Mr. Higgins knows this whole thing. I'd just say my goodness he has written for the Old Pacific World Press, some other Chicago agricultural magazines on water manure flushing up into the north coast dairies and adjacent to the Oregon coast quite early in the century, probably about — I'd say probably in the 20's or early 30's.

Q From your research do you know anything about the history of those things back to the turn of the century?

A Only what I have heard from discussions with Mr. Higgins and Mr. De Carlie. I think Mr. De Carlie may be now deceased. Mr. De Carlie lived ir Stockton. Mr. De Carlie is the one that has introduced some of these modern dairy concepts several decades ago.

Q How far back does your own investigations



show you [38] that there were water flush systems used for this purpose?

A My own investigations or observations?

Q Either one.

A Observations about — about '61, perhaps 1960. By reading and with discussions with old-timers, it is obvious that dairy cows and dairy standing platforms were hosed down to collection sumps lower than the concrete back several decades prior to that. There are many old blueprints in the University's files showing concreted cow standing areas with sumps at the bottom and fire hoses, in effect, to wash the manure, hose the water down, in the 20's, but — so there I think we — we are hung up on what we interpret as flush out —

Q What water flush systems were there, say, prior to 1960 other than by the use of a hose?

A There were flush out systems if you go back and read *Hoardes' California Dairyman* you will find reference at least as early as 1957 on flush out systems.

Q Yes.

A The information apparently wasn't available to the patent examiner when he granted this patent.

Q One has to read what? I did not catch those names.

A I said if you go back and read Hoardes Dairy — H-o-a-r-d-e-s, *Hoardes Dairyman;* it is published in Indiana or Wisconsin, which is it? Wisconsin. It is basically a bimonthly. Does that mean twice a month? It is —

Q Bimonthly is every two months; semimonthly comes twice a month.

A *Hoardes Dairyman* is more or less the bible of the [39] American dairy industry.

Q It is a magazine?

A Magazine.

Q Published by —

A Well, what is it? *Hoardes Dairyman*. I might have a reference here. It is published in — humph, Wisconsin, I think, and it had — I know it had articles on manure flushing systems. One was brought to my attention back in — sometime in 1957, in one of the issues of, I think, *California Dairyman*, or *Western Dairyman*, but I don't know which — carried an article back in the late 50's.

Q When you say flush out system, can you tell us or would you describe the kind of a system that was referred to?

A Using a big flow of water across the floor — or, pardon me, down a cow standing platform.

Q And you know how that water was introduced onto the floor of the dairy?

A One was from a tank, as I recall, humph. One of the articles — one magazine talked about the use of a tank to hold this water; the other one, I think, had alfalfa — piped out on alfalfa. I would not want to be quoted, but the point is that it is my — it is my impression now that these things were — that those stories were not brought to the attention of the patent office.

Q Now, what was this one? Well, is it your recollection and opinion that these flush out systems that were referred to back in 1957 used a tank and were quite similar to the Ag Pro patent device?

[40] A Very similar, yes, sir.

Q Who has the file of these papers? Are they to be found there in this collection of Mr. Higgins' that you said were given or he sold them to Davis?

A Hal Higgins; the Higgins' Library. I don't think



— I don't suppose he has those in his collection, but those magazines are both still in print and they are available from the editorial offices.

Q Oh, yes.

A I do not think I have either of those magazines with me. I would have to get their editorial offices, and so forth, from — from my office, or refer you to somebody that has them.

Q You are familiar with these flush systems or wash out systems that several dairies have up in the neighborhood referred to as Lodi, Weed, and Bishop, in California?

A Yes.

Q Now, those were done by the use of adjacent streams, were they?

A Only the Weed was an adjacent stream; the one in Lodi used irrigation water out of an alfalfa pipeline system — just flowed up in the barn and out the back in the irrigation system, and the Bishop — Bishop I think was alongside an adjacent stream, and they just cut the stream through the barn.

Q Do you recall that they used a weir in doing that at any of these places?

A Both the Weed installation and the Lodi business, [41] that installation used a weir; in other words, they channelized the small stream right alongside the dairy barn so the manure would go out. They dropped a sheet metal weir across the stream and cut it into the barn, and they would bring the cows in.

Q Did they have a weir to stop the stream and did they have another one then to direct the flow of it into the barn?

A They didn't; it just took one weir to stop the stream. That sort of backed up the stream. The stream

then flowed up this Y arrangement through the barn.

Q Yes. So that it diverted this water directly into the barn and it flowed down the barn floor and out the lower end?

A Uh-huh.

Q That is essentially like all these flush out systems, the use of the gravity flow of water in order to run the water over the floor and wash it out?

A The mechanics of it, of that aspect of it in flushing operations, yes, are very similar if not precisely the same. That is why I was disturbed at certain features of the patent and that is why I was one of the persons who said that patent needed to be examined in the light of — because already there was a lot of prior history of that concept.

Q Well, it was your opinion, was it not, Mr. Fairbank, that there was a lot of the same old things and the same old ideas being used, was it?

A Many of the same things.

[42] Q Many of the same things, and that this use of the gravity flow of water to wash the barn floor wasn't new.

A Yes.

Q And isn't the use of gravity water for flushing down manure from concrete, cows' standing area, almost as old as dairying in California?

A Yes.

Q And it was long before 1963, and at times the water had been obtained by collecting it in some kind of a pond? Pool? Tank? Or whatever?

A I am hesitant to answer that question because I don't know where the difference between, frankly, a stream, a ditch, a pond, a tank is; kind of a vague demarcation between those different hydraulic devices.



Q But there are different means of collecting enough water at one place so it can be released?

A I want to say collecting water without specifically defining whether it was a static collection or a moving dynamic situation; that is where I think we get hung up.

Q Let's see, collection of water; then, let's say collected water.

A Yes, it has been long used.

Q Long before 1963, hasn't it?

A My goodness, yes.

Q It goes back, at least, to the turn of the century, do you think?

A The Hal Higgins' collection would indicate it goes certainly back towards the early California dairy; I wouldn't [43] say, specifically, turn of the century but for quite early this century dairies were using hoses.

Now, see, there is my point. When is the hose stream collected water? It is — that is what we are hung up on, I think. I mean, a hose stream is coming out of water standing somewhere, a pressure tank, so whether it is dynamic or static, I don't know.

Q The Ag Pro patent used a drop gate in order to release this water on the barn floor?

A And also a tilt bucket they had.

Q They had both in it?

A Both.

Q And I believe you heretofore expressed your opinion that drop gates and tilt buckets both are old in use, long before '63?

A For other purposes.

Q But there is nothing new about a drop gate, is there?

A Nothing.

Q But a drop gate there is nothing new, and the tilt buckets have long been in use for one purpose or another?

A Yes.

Q And the same thing can be said, generally speaking, about putting water in any kind of a tank whether it is made out of metal? Wood? Or concrete?

A I suppose.

Q The fact is they have been used on farms or ranches for — well, going back to the first of the century again.

[44] A They have been used on farms and ranches, generally speaking.

Q Well, they have been used by dairymen —

A Nobody is questioning that.

Q And you agree to it then?

A Yes.

Q Some dairy farms for long long years prior to 1963 had used a drain with a grading on it, so forth, manure to drop in, had they not?

A Yes, it was required by State law.

Q And had turned the water onto the drain then to wash the drain out, was the way they devised it in many of these instances?

A Variations of them are required by the state for Grade A certification.

Q Which was one way of doing it. It is one kind of a manure flush system although it was not on the barn floor level?

A I assume the drain would be a little below the level.

Q Yes. The drain was normally referred to as the gutter in the dairy barn itself?



A Yes, it was below the general level of the slab or the platform.

* * * *

[45] Q Do you know where these manure flush systems have been used? Where they are done by releasing water abruptly from some kind of a tank, or they hose it down by some hydraulic system, or they have a gate and open the gate; do you know about that?

A The only one I can think of, even a manually operated gate — I can't think of a hydraulic gate for flushing manure — it is a pull cable though from the barn out to the gate, but I can't remember any hydraulic or circuit mechanisms.

Q It is true, is it not, Mr. Fairbank, that — I am relating my time now to prior to 1963 — that the use of [46] flowing water even in sheet form for cleaning off barn floors was not new?

A That is correct.

Q And that the use in dairies —

A To use a sheet form is a hell of a poor term. Pardon me, I would not want it on the record, but the sheet form, what is a sheet of water? How is that defined? That is — that is one of those unfortunate words.

Q Well, it may be, but it has been used that way and that is the reason I used it. I want you to explain or tell me what it is for the record here.

A Well, to me when I turn a fire hose down a floor to hose a floor off, it fans out and makes basically a sheet of — sheet flow of water, or if you have a drop dam twenty feet wide, a drop that — that means a drop more or less level set, so I think it is kind of a rather ambiguous, if not nondescript, term —

Q Yes.

A — could lead to some misunderstanding.

Q And the use of dams in manure gutters was also not new at that time?

A Oh, I would have to say no, having seen those installations up in both Weed and Bishop.

MR. HULSE:

I don't believe I have any other questions.

EXAMINATION

BY MR. KOLISCH:

Q Mr. Fairbank, would it be fair to say that you [47] have been for some time unfriendly toward the Gribble and Bennett patent?

A I would have to say yes, I have been unfriendly with the patent since it was brought to my attention because of my prior knowledge of the state of the art.

Q So, to that extent it would be fair to say that you would be a hostile witness towards the Gribble and Bennett patent; would that be fair?

A That would be a fair statement.

* * * *

[50] Q You were testifying in connection with a series of questions that Mr. Hulse was asking you with respect to prior art flush systems which you consider very similar to the patented Ag Pro system.

A Yes.

Q Wasn't the substance of this information provided by you to Mr. Hulse in 1969?

A To my knowledge, yes.



Q Can you identify those twenty-one letters which you sent to Mr. Hulse?

A No, I — like I say, it was this — it was — where in this section of that file that is, all I can say is I can't specifically identify them.

Q There isn't any way of your looking through that file now and telling us which ones you did send to Mr. Hulse and which ones you didn't?

A No.

Q Is there any way of determining whether in anyone of those letters there was any mention of the Mission Dairy?

A Oh boy! Yes, here is one right here, June of '68.

* * * *

[54] Q Well, I informed you in the correspondence, or telephone conversation, that the defendant had submitted an affidavit from Mr. Meyer of the Mission Dairy who said that he first talked to Mr. Sakraida in January of '73.

A Okay. Now, establish now — what was —

Q Now, my question is: Did you, after I had discussed the matter with you, then volunteer the information that, in fact, you had told Mr. Hulse about the Mission Dairy in your conversations with him prior to your signing the first affidavit?

A I am with you. Yes, I would answer that yes to that.

Q That was not something I told you; this was something that —

A Right, that is — I am agreeing to that subject, to subject to — or rather in light of what Mr. Hulse brought up a little while ago. There might be some

question here of it as to whether I brought this to Mr. Sakraida's attention, or his attention, or if, in fact, I ever wrote to anybody, so subject to that cross examination I would agree to it.

Q As a matter of fact —

A In other words, I agree that I told you, yes, in March, that I had brought the Mission Dairy to the attention of Mr. Hulse.

Q As a matter of fact, weren't you having most of [55] your negotiations or conversations with Mr. Hulse with respect to the affidavit that you were going to submit?

A Yes.

Q Is there any reason that you would not have told Mr. Hulse about the Mission Dairy in the course of a five minute conversation, if that is the longest conversation that you had with him?

A I don't know.

Q There is no reason why you could not have told him about the dairy in a conversation of five minutes?

A Yes, I would say yes to that question; no reason why I could not. That is correct.

Q The fact that you had brief conversations with him would not have precluded you from telling him about the Mission Dairy?

A No.

Q Do you recall in the course of the conversation that we had in March of '73, I mentioned to you that in your October 13, 1969 affidavit you had not made any reference to the Mission Dairy, and I asked you about this. You told me that, as a matter of fact, you were rather surprised when this affidavit was finally submitted to you that there wasn't any reference to the Mission Dairy after what you had suggested to Mr.



Hulse; it was a potentially good field of investigation.

A (No audible response.)

Q If you have lost the question, maybe she can read it.

[56] A I think I have it.

Q Did you follow the question?

A And I know I was — I would answer yes to that question.

Q At this time is there any question in your mind that in October, 1969, you told either Mr. Hulse, or Mr. Sakraida, or possibly both of them about the existence of the Mission Dairy?

A Well, I am agreeing with your — your viewpoint there, your question. I am not sure whether you had the preposition "not" in that sentence or not, earlier back, so I do not know whether that calls for a yes or no answer.

Q There isn't any question in your mind that you —

A Yes —

Q — that you talked to one of them, or the other, or possibly both of them about the Mission Dairy flush system?

A Yes.

Q My statement is correct?

A Yes, your statement is correct, and I am not sure though how — whether it was phrased in the positive or negative.

Q You were asked a series of questions with respect to elements of the prior art which included various flush concepts, and if I understood your testimony correctly you agreed that as far as you knew prior to the Gribble and Bennett patent application you knew of the various elements called for in the claims with the exception of a dam construction in the

dairy itself where the water was collected as a pool on the [57] floor, or above it, and that that was used as a flush means.

A Yes, I agree with that statement, yes.

Q That is the one element you were not able to find in the prior art; everything else you were able to find?

A That is the only element I was not aware of was a drop dam on a dairy floor for purposes of impounding the water for that reason.

* * * *

EXAMINATION

* * * *

Q BY MR. HULSE: Well, let's put it this way: In [58] view of the state of the art and what was known among various dairy people, there wasn't a thing particularly new about it, was there?

A Rather than answer yes or no — excuse me, the drop dam we just spoke of I would consider new. That feature, yes. Everything else, no. That is why I say it — I can see that one innovative feature, but that is the only innovation in it. That has been my position all along. That has been my position from the time I first read the patent application and the subsequent patent granting it. It was much too broad and that is why I was — to use your word — hostile towards the patent.

Q And in what respect do you think it is too broad, Mr. Fairbank?

A Well, basically a patent of running water downhill, putting — cows standing on concrete, using the flowing water as a method for cleaning the con-



crete, these were all prior art which were apparently not brought to the attention of the patent examiner.

Q In —

A And I also conceded and the record will show that I had admired Mr. Gribble's innovation of a drop dam.

Q Now, when you say a drop dam, that essentially is a drop gate, is it not? As a means of —

A I suppose.

Q I have taken that word off one of your letters, so I think we ought to have a report on that, about that term drop gate.

[59] A Okay.

Q And as you have heretofore said, a drop gate, itself, is old; there is nothing new about that.

A That is right; a drop gate itself.

Q So, the only thing that could possibly be new in line of what you have just said would be the fact that they took an old drop gate and put it over here to release this water?

A That to me was innovative.

* * * *

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Plaintiff's Exhibit No. 2

[Title Omitted in Printing]

AFFIDAVIT OF W. C. FAIRBANK

STATE OF CALIFORNIA
County of Riverside

W. C. FAIRBANK, being duly sworn deposes and says:

I am the same W. C. Fairbank who submitted an affidavit in the above-entitled case on October 13, 1969 and I am still employed as Extension Agricultural Engineer, Agricultural Extension Service, University of California, Riverside, California.

In the mid 1960's I was quite familiar with the Mission Dairy and its manure flush system, as I was actively traveling that area and visited it on several occasions.

My prior affidavit was prepared as a result of telephone conversations with Mr. Sakraida's attorney, J. F. Hulse. The dates of those conversations were slightly preceding the date of execution of my affidavit on October 13, 1969.

In the course of my telephone conversations with Mr. Hulse, I specifically told him about the existence of the flushing system at the Mission Dairy, which I considered to be similar to the patented Ag Pro system. I suggested to him that someone should investigate the date on which the flushing system at the Mission Dairy went into operation because it might be prior to the Gribble and Bennett invention. Mr. Hulse acknowledged the information and said that he would relay it to his client.

/s/ W. C. FAIRBANK
W. C. Fairbank



Subscribed and sworn to before me this 13th day of March, 1973.

/s/ MARION L. MEAD
Notary Public in and for the County of Riverside, State of California
My commission expires:
(SEAL) July 13, 1975

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Defendant's Exhibit No. A

University of California
Agricultural Extension Service

Riverside, California 92502 October 8, 1969

J. F. Hulse, Attorney-at-Law
Scott, Hulse, Marshall & Feuille
11th Floor — El Paso National Bank Bldg.
El Paso, Texas 79901

Dear Mr. Hulse:

Apparently our letters crossed in the mail.

I like this revised affidavit better. Please note that I have crossed out several words and statements to make it correct. I can only cite prior use of flowing water across barn floors for the purpose of flushing away manure — not the use of a tilt bucket or a dam for impounding the water *on the floor*.

I hope this clarification is helpful.

Very truly yours,

/s/ W. C. FAIRBANK
W. C. Fairbank
Extension Agricultural Engineer

WCF:acb
enc.

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[59] ORDER

[Title Omitted in Printing]

Filed: Feb. 7, 1974

On this 7th day of February, 1974 came on to be considered a Motion For New Trial on newly discovered evidence pursuant to Rule 60 (b) (2) F. R. Civ. P. and the opinion of the Fifth Circuit Court of Appeals on Petition for Rehearing. (See *Ag Pro, Inc. vs. Bernard A. Sakraida*, ____ F.2d ____, 5th Cir., June 25, 1973, NO. 72-1108) In that opinion, the Court of Appeals ordered this Court "to hear and determine said motion before proceeding on the issue of infringement. The District Court will then certify to this Court the entire record, including its opinion and order and the testimony taken on the new trial issue."

In accordance with this mandate, briefs have been filed by the parties and studied by the Court and a full evidentiary hearing held on the matter. As a result of



the hearing the Court finds for the reasons stated herein that the Motion should be granted. The testimony adduced from witnesses for the Defendant in support of the Motion for New Trial would, standing alone and unchallenged by opposing evidence, overcome the presumption of validity of Patent No. 3,223,070. This testimony clearly shows that the "flushing system" in question was not new nor novel and does not meet the nonobvious test under 35 U.S.C. 103. The evidence is replete with references to the prior art of similar, if not identical, "flushing systems" that suggest to the Court that the applicant's claim was anticipated by those of ordinary skill in the art.

The Court further finds that the defendant did in fact exercise the due diligence required under Rule 60 (b) (2) and that the evidence presented to the Court at the hearing could not have been discovered in time to move for a new trial under Rule 59(b). In fact, the evidence clearly shows that the names of witnesses and the nature of their testimony was discovered purely by chance by the Defendant himself at a meeting in January of 1973 by Mr. Herbert G. Meyer. Mr. Meyer and all Defense witnesses presented at the hearing testified they had never been aware of the litigation of the case at Bar at any time prior to this meeting.

In light of the foregoing, it is ORDERED, ADJUDGED and DECREED that the Motion for New Trial should be and the same is hereby and in all things GRANTED in that the evidence compels a rehearing of the issues and questions raised and that such evidence was not available to the Defendant in spite of the diligence exercised during the initial discovery of this cause.

It is FURTHER ORDERED that the expense of this proceeding along with the cost of furnishing the Court of Appeals the entire record and this order and findings shall be borne by the Defendant-Movant, but will be taxed as costs pending the final outcome of this cause.

ENTERED this 7th day of February, 1974 at El Paso, Texas.

/s/ JOHN H. WOOD, JR.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

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TRANSCRIPT OF PROCEEDINGS
OF FEBRUARY 7, 1974

[Title Omitted in Printing]

Filed: June 24, 1974

[19] BERNARD A. SAKRAIDA,
the defendant, called by the plaintiff, having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

* * * *



[21] QUESTIONS BY MR. HULSE:
Q Would you state your name, please?
A Bernard A. Sakraida.
Q And where do you live, Mr. Sakraida?
A Okeechobee, Florida.
Q In — I'll ask you, are you the same Bernard A. Sakraida who is the defendant in the case of Ag Pro Inc. versus Bernard A. Sakraida pending in this court?
A Yes, sir.
Q And how long have you lived in Florida?
A About three years, approximately.
Q Mr. Sakraida, I will ask you whether or not sometime [22] after you moved to Florida, did you hear anything or not about the Mission Dairies in Gonzales, California in connection with possible information in connection with this case?
A Yes, sir, I did.
Q Could you tell us what you hear?
A I heard they had some type of flush system similar to what we are talking about today.
Q And did you — You were in Florida?
A Yes, sir.
Q Do you know where you got that information?
A No, I don't, but someone either a dairyman or someone that I knew told me about it.
Q And did you make any effort then to see what the situation was over at the Mission Dairy in Gonzales, California?
A I asked Mr. *Wisdon* who lives in Medford, Oregon, when he came down through the area would he stop and check it for me and see if he could find me any information.
Q What business is Mr. Wisdon in?

A He is the sales representative for *Ross-Holmes* Dairy Equipment.

Q And did he travel that area?

A He travels all over the United States.

Q And did you get a report back from Mr. Wisdon then about [23] his effort to find out what they have there at the Mission Dairy?

A Yes, sir. He told me that he went to Mission Dairy and talked to the general manager of the dairy farm, and his name was Dick *Ripley*. And Mr. Ripley said that he was not at liberty to give information and did not want to get involved.

Q Thereby, did you gain any information or obtain any information then from the Mission Dairy as to what they had in the way of a flush system?

A No, I did not.

Q And your understanding was that Mr. Ripley said that they would not disclose it because they don't want to get involved?

A That's what I understood.

Q All right. I will ask you whether or not that's the only information that you have had about the Mission Dairy in this connection.

A Up until that date, yes, sir.

Q And, you have seen of course attached to the response to appellant's petition for rehearing and telegram that was dated in March of 1973 from Mr. Frank *Sousa;* did you know anything prior to that time about Mr. Sousa's dairies or operations?

A I just knew that Mr. Sousa built dairy buildings.

[24] Q Did you know what kind of dairies they were or what they had in the way of a floor-cleaning system?

A No, I did not.



Q I will ask you whether or not at the time this case went to trial in September of 1971, did you know of any dairy at that time that actually had a floor-cleaning system that used a drop gate for the purpose of washing the floors off?

A Prior to 1971?

Q Yes, prior to the time this case went to trial in 1971.

A Well, *Dawn* Dairies has them.

Q Dawn Dairies? Who had built that one?

A I had built it with Ag Pro.

Q But this was a Gribble Dairy, Mr. Gribble's dairy?

A Yes, sir.

Q And when did you build it?

A Let's see, I believe it was 1966.

Q Well —

A Or '67.

Q Did you know of any others?

A Well, I —

Q Let me put it this way, because we can cut off some of these later ones, did you know of any that were in existence prior to November 1963?

[25] A They had a similar one up at Piney Hills.

Q Have you seen it?

A I went up to see it during the time I was building —

Q When was this did you say?

A During the period of 1966 to '67.

Q Who built that dairy?

A I don't know. I think that Ag Pro did.

Q You think it was Ag Pro that — the Plaintiff here?

A I think so, yes, but I'm not sure.

MR. HULSE:

I believe that's all.

CROSS EXAMINATION

BY MR. KOLISCH:

Q What was the date, Mr. Sakraida, on which you first got information concerning the Mission Dairy?

A The date?

Q Yes, sir.

A I believe I was in Florida, I believe it was in 1971.

Q What month?

A I don't remember.

Q From whom did you get that information?

A That I testified before I don't remember whom I got that information from because I talked to a lot of dairymen and a lot of dairy builders and a lot of people who [26] traveled throughout the country, and I got their information, and the reason I asked Mr. Wisdon to get it for me.

Q Specifically what was the information that you received?

A As I testified before, that they had some prior, similar type of flush system prior to Ag Pro —

Q Did you consider that to be an important piece of information?

A I considered it to be important if there was anything there, yes, sir, but I didn't know what was there.

Q Did you communicate that to your attorney?

A Yes, we discussed it.

Q And you did mention to Mr. Hulse that there was this Mission Dairy which someone told you had a similar flush system?

A I told him that Mr. Wisdon had told me that the —



that the foreman would not give the information out concerning any parts of the flushing system.

Q Did you inquire from Mr. Hulse whether it was possible for you to obtain that information?

A I believe about that time we had a summary judgment against it, and there wasn't any need for me to pursue it any further.

Q You don't mean against you?

A Against you, yes, sir.

[27] Q But you did discuss with Mr. Hulse getting information concerning Mission Dairies.

A I don't recall just exactly what we did discuss, on the Mission Dairy. I was —

Q Did you know of any other piece of prior art information that was more pertinent than the Mission Dairy?

A I couldn't answer you that, because I don't know how pertinent the Mission Dairy was up until now.

Q Well, you had heard —

A I didn't know anything about it, even that they had a flush system.

Q Yes, but you had heard that they did have a flush system, didn't you?

A Sir, I hear a lot of things about people doing certain things with dairies like taking out equipment and putting it back in. Some of those things you just have to overlook. I mean some of them are true and some of them are not true.

Q Did you discuss the Mission Dairy with Mr. Fairbanks in 1969?

A No, I did not.

Q Your testimony is that at no time in 1969 you had any discussion with Mr. Fairbank concerning the Mission Dairy?

A I don't recall having discussed it with him in 1969 [28] about Mission Dairy.

Q At any subsequent time did you have any discussion with Mr. Fairbank?

A Not that I recall.

Q Did you have any discussions with Mr. Hulse concerning any discussion that he had of the Mission Dairy with Mr. Fairbanks?

A Seems to me like most of the discussion we had was about . . . (inaudible) or some other place.

Q Did Mr. Hulse ever tell you that Mr. Fairbanks had suggested that Mr. Fair — that Mission Dairy was a prior art that should be investigated?

A I don't recall that, either.

Q Did you know Mr. Fairbank in 1969?

A I knew Mr. Fairbanks before 1969. I had met him in northern California.

Q And you knew Mr. Fairbanks as what, you knew him in what capacity?

A I don't think I would know him if he walked in this room.

Q I am talking about his position.

A Well, —

Q Do you know what his capacity was?

A Well, the only capacity I know of, he wrote certain articles in magazines concerning the Department of [29] Agriculture, and so on.

Q You knew he represented the Agricultural Extension?

A Yes, he was in Agricultural Extension, certainly.

Q And isn't it a fact that Mr. Fairbank was cooperating with you, that is, as defendant in this case, in trying to invalidate the Gribble and Bennett patent;



isn't that a fact? Didn't he submit an affidavit in October 1969 on your behalf?

A Yes, I believe he did.

Q And where did you get that affidavit? Or how did you get that affidavit, rather?

A I don't really know how we got that affidavit.

Q Didn't you talk to Mr. Fairbanks in connection with getting that affidavit?

A You're talking about a long time ago. I don't remember how we got the affidavit, whether it was sent to us or how we got it; Mr. Hulse took care of it.

Q Mr. Hulse must have found about it, about Mr. Fairbanks, from someone, and I am trying to find out whether you were the one who told about this Mr. Fairbanks.

A Well, I probably did tell him about Mr. Fairbanks, because he wrote articles in the magazines all the time.

Q Well, doesn't this help refresh your recollection that in 1969 you would have discussed this case with Mr. Fairbanks?

[30] A This case, perhaps, but not necessarily the dairies.

Q That's what I want to get to, what do you remember of your discussions?

A I didn't talk to Mr. Fairbanks about this case directly.

Q Well, you say you didn't talk to him directly; what does that mean?

A Well, I talked — I had Mr. Hulse talk to him.

Q Well, didn't you tell Mr. Fairbanks that Mr. Hulse would be in touch then with him?

A I could have done that very easily.

Q Well —

A But I don't recall whether I phoned or how it came about.

Q And do you recall that Mr. Fairbanks told you that he would assist you in trying to invalidate the Gribble and Bennett patent?

A I recall something of that nature; he said sometime that he would if he could.

Q And do you recall that he provided you with information which he thought might invalidate the Gribble and Bennett patent?

A I don't know that he put it that way.

Q Well, let me ask you —

A I don't recall him putting it that way.

Q I didn't say whether he put it that way, but I just [31] asked you whether you recalled, without saying what the information was, that he provided you with information with respect to what he considered to be prior art dairies?

A I honestly don't know whether — I don't know what he provided us with that I can recall right now to tell you.

Q What were your other sources of information in 1969 concerning prior art?

A I don't recall any other sources.

Q I'm sorry, I can't hear you.

A I don't recall any other sources.

Q So Mr. Fairbanks was your principle source of prior art?

A Well, I don't know whether he is a principle source of prior art or not, since I don't know whether or not any of these dairies he is talking about had anything to do with this.

Q Do you recall anybody else who told you about other dairies?



A No, sir.

Q So the only one you recall is Mr. Fairbanks?

A I recall Mr. Fairbanks.

Q Why did you select Mr. Wisdom to go to the Mission Dairy?

[32] A Because I know he goes everywhere and I've done things for him. We check out something in a different territory — it's a long way from Florida to California, and I was right in the middle of a job and it was very difficult for me to get away, and I didn't think he would have any problem.

Q Why didn't you think he would have any problem?

A Because they had Ross Holmes Equipment there.

Q It is a fact that the Mission Dairy had bought Ross Holmes equipment?

A Not as you know it today.

Q I am talking about in 1969, as of 1969.

A It was a different type of Ross Holmes equipment.

Q But it was Ross Holmes equipment?

A A star lines installed, made by another manufacturer.

Q Now isn't it a fact that when someone has installed equipment in a dairy that he is a representative, he can always have access to such installations?

A Well, are you referring to Mr. Wisdom?

Q Well, I am referring — you are in the dairy business —

A Are you referring now to me, or to Mr. Wisdom?

Q I am referring to you and your general knowledge of this business.

A You mean if I worked for Mission Dairies?
[33] Q If you installed equipment and you wanted to take a look at the dairy, would you be denied access?
A Depends on if there was something coming on a patent like this, I don't know.
Q Have you ever been denied access to a dairy where you installed equipment?
A I always asked the owner; I don't just walk into a man's house.
Q I am asking you whether you have ever been denied access to a dairy where you installed equipment.
A No, I have never had any trouble with any dairyman where I installed equipment.
Q What is the business relationship that you have with Mr. Wisdom?
A We don't have any direct business relationship with each other, any more than I have with anyone else who sells dairy equipment.
Q And do you buy and have you bought over the years much Ross Holmes equipment?
A I have never bought equipment from Ross Holmes.
Q Have you bought equipment from Mr. Wisdom?
A No, sir.

* * * *

Q After Mr. Wisdom told you that he had been denied access to the Mission Dairy, what did you do?
A I don't remember the dates or anything, I don't recall exactly what did happen. It seems to me like we had a summary judgment. After that, and there was no reason to pursue it any further.



Q Did you record the summary —
A He is the one that got it.
Q I am talking about the fact that Wisdom had been denied access.
A I don't recall exactly what I did.
Q Now —
A But that was sometime after I had asked him, because it [35] was quite awhile before he got back in from the West Coast, because he was at that time on the East or Southwest, out in that country somewhere.
Q Did you discuss with Mr. Hulse getting that information from Mission Dairy dispite the refusal to let Mr. Wisdom have access?
A I assume so, but I don't recall exactly what was discussed about it.
Q You don't recall what Mr. Hulse told you with reference to getting access to that information?
A We weren't sure that they even had anything.
Q That's what you wanted to find out?
A Yes, but we weren't sure. Gonzales is quite a ways out in the countryside, not just like stepping out of El Paso a few miles.
Q Isn't it near Salinas?
A I don't know exactly; not too far from Salinas, somewhere in that area.
Q Mr. Wisdom told you that he had been denied access by the manager of the dairy; is that right?
A Yes, sir.
Q Did you inquire as to who the owner of the dairy was?
A No, I did not.
Q Did you yourself make any inquiry?

[36] A No.

Q Did you discuss the Mission Dairy with Mr. Wisdom?

A He just told me that Mr. Ripley was instructed by his boss not to get involved.

Q Didn't you discuss with Mr. Wisdom what the flushing system might be at the dairy?

A He said he didn't know.

Q Well, didn't you know and didn't he know that that equipment had come from Ross Holmes?

A There was a lot of equipment.

Q Well —

A There was a lot of equipment. At this time he was connected with Ross Holmes, Mr. Wisdom, and he still is.

Q Did Mr. Wisdom tell you that he had never been to Mission Dairy himself, or that he had never visited the Mission Dairy?

A No, he never told me any such a thing.

Q Did you ask him so to see if he could find out this information from Mr. Ripley?

A I asked him if he couldn't try a second time.

Q Did he ever report to you?

A In the meantime we had this summary judgment.

Q Did he ever report to you his access to Mission Dairy?

A No, sir.

[37] Q And did you discuss with Mr. Wisdom that he could ask somebody in the Ross Holmes organization what was out at Mission Dairy?

A I am sure he would know as much about it; there would be no reason for me to go beyond Mr. Wisdom.



Q Since Ross Holmes had installed it, there were persons that new exactly what was at the Mission Dairy; right?

A I am not sure that he installed it, because usually they ship it and another one installs it; I haven't the slightest idea who built it.

Q You knew that Ross Holmes equipment was at that dairy, didn't you?

A I knew that Ross Holmes and Parks was there.

Q To find out what was at the Mission Dairy installation?

A No.

Q Are you familiar with the publication called the "California Farmer"?

A No, that one I don't get.

Q You never heard about it?

A I have heard about it.

Q All right, and —

A I have heard about it, but I don't subscribe to it.

Q What do you know about the publication?

A It is a farm magazine is about all I know about it.

Q Do you know —

[38] A That's all I know about it.

Q You have looked at copies of it, of the California Farmer?

A It's been a long time if I have at all.

Q I will show you an article from the California Farmer of March the 20th, 1965, with the heading "remodeled dairy sets some amazing records," and this is an article on the Mission Dairy. I will ask you if you ever saw that (indicating).

A This is from the California Farmer?

Q Yes, you will see it. It's marked below.
A What do you want me to do, read it?
Q I will ask you if you ever saw this article; read it over.
A I don't recall seeing this article, no.
Q You don't recall it?
A I don't recall seeing it, ever.
Q Do you recall at any time during 1965 receiving an invitation to attend a Mission Dairy field day in February, the 9th of February, 1965?
A I never heard of Mission Dairy until recently. I never heard of Mission Dairy in 1965.

MR. KOLISCH:
Those are all the questions I have.

[39] CROSS EXAMINATION

BY MR. HULSE:
Q Mr. Sakraida, when you asked Mr. Wisdom to look at the Mission Dairy Farm, where were you living then?
A Florida.
Q And when did you move to Florida?
A Let's see, I don't remember if it was '70 or '71.
Q Then with respect to the year 1969, what occurred when you were in Florida would that have been in 1969, or '70 and '71?
A What do you mean?
Q I am talking about when you asked Mr. Wisdom to look at Mission Dairy.



A It seems like it was '69.
Q Were you living in Florida then, or not?
A I believe I was living in Florida in '70, not '69; I don't remember.
Q Okay. Where did you live before you went to Florida?
A El Paso, Texas.
Q El Paso, Texas.
A Right here.
Q And when did you leave here?
A I believe in the fall of 1970.
Q And this matter of asking Mr. Wisdom to take a look at the Mission Dairy, was that before or after you moved [40] to Florida?
A After I moved to Florida.
Q Did you know at that time when the Mission Dairy had begun operating or how far back it went in the matter of time?
A Pardon?
Q Do you know how long it had been in operation?
A No.
Q You said that in 1965 you never had even heard of them?
A No.
Q Other than what you testified about the occasion about which you asked Mr. Wisdom to check it out, when did you next hear about the Mission Dairy. Let me rephrase the question. Did you meet a Mr. *Herbmyer* in Florida in 1970?
A Yes, sir.
Q Did you previously know him?
A No, sir.
Q And I will ask you whether or not, state briefly how it was that you happened to meet him.

A He came to Florida. He told me he had some business, and while he was there, he understood we were building a 22,000-cow dairy and would like to know if I would have the time to show him around.

[41] Q Was that when you met him?

A I met him I believe, and I am not certain of this in Daniel's Restaurant, and I had not met him before, and so I had to ask two or three people before I found him.

Q And what is his connection?

A I understand he is the owner of Mission Dairy.

Q And did you learn what kind of a floor-cleaning system they had from him at that time?

A I did, because when I was showing him around the dairy, we went by the area with the gates and I told him there was a lawsuit over it, and he said "It is impossible," and started from there.

Q I will ask you whether or not you — whether or not that's the first time you actually had any information about what kind of a system they had at the Mission Dairy.

A Yes, then he told me about his system.

Q And was that the occasion for obtaining the affidavit attached to our motion before the Court of Civil Appeals in New Orleans.

A Yes, sir. I asked him why he hadn't said something about it, and he said that he had been instructed not to say anything about it.

Q Do you know where the other information came from about people like Mr. Sousa and Mr. Whitmore? Did you obtain any information yourself, or did he come to you after- [42] wards through Mr. Meyer?

A Mr. Meyer.

MR. HULSE:

That's all.



## REDIRECT EXAMINATION

BY MR. KOLISCH:

Q During what period of time did you live in California?

A I believe from '64 until '68 or '69. I don't recall when I left California, whether it was '68 or '69.

Q During that time were you building dairies in California?

A Yes, sir.

Q Were you operating as a general contractor?

A I was operating as a general contractor and also as a consultant-supervisor.

Q During this period of time, how many dairies did you build in California?

A I don't know.

Q What is your best estimate as to the number?

A To what extent, completion?

Q That you were involved in, whether completely or involved in the construction in some way.

A It is going to take a little while. (Pause.) Most of the dairies, I built large ones. You already have [43] all this information. I built two in *Hemmit*, and one for Mr. *Secairian*, and Dawn Dairies, *Jessep's* Dairy in Bakersfield, California, and some in northern California, and I don't recall their names right now.

Q But you were building dairies relatively throughout the state of California through this time?

A As well as commercial buildings and churches.

Q You don't recall where in northern California?

A Up in the extreme northern part of the state; they were small ones.

Q Did Mr. Meyer tell you why he didn't want to get involved in this lawsuit?

A After he found out what was going on, he did want to get involved in it; that's my understanding.

Q Well, he found out after the decision had been against you in the Court of Appeals?

A No, sir. I talked to him before the Court of Appeals. I told him it was before the Court of Appeals in January; I didn't even know the outcome would come out like it did.

Q In your discussion with Mr. Meyer, apparently he told you at one time that he didn't want to get involved.

A Mr. Meyer never did tell me any such thing.

Q Then I didn't understand your testimony?

MR. HULSE:

[44] I think he is going to mislead the witness if he can. He testified that Mr. Wisdom said that Mr. Ripley said the manager didn't want to get involved.

MR. KOLISCH:

I recall the witness having said that he discussed it with Mr. Meyer, and that those were his instructions.

QUESTIONS BY MR. KOLISCH:

Q I am now talking about your January discussion with Mr. Meyer.

A Well, I don't know why. He didn't explain to me.

Q It was in January, did Mr. Meyer tell you that he had told Ripley that he didn't want to get involved, and not to show that dairy?

A I understand he told Mr. Ripley that he didn't want him to get involved.

Q Mr. Ripley?

A Mr. Ripley himself. The way I understand now, if



anyone comes to see Mr. Ripley about that dairy, he would discuss it at their office; that's what I understand.

Q Did Mr. Wisdom tell you that Mr. Ripley told him that he had to go see Mr. Meyer?

A I don't know what he told him.

Q I am only asking you what Mr. Wisdom told you.

[45] A I told you what Mr. Wisdom told me.

Q He didn't tell you anything more than what You have told us?

A No. I am not even sure he told Mr. Wisdom that.

Q Did Mr. Meyer tell you that he had shut his dairy off from others seeing it during any period of time, that it was out of bounds for people to go in and see what was going on in his dairy?

A No, he didn't.

* * * *

A. M. WISDOM,

a witness, called by Mr. Hulse, having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. HULSE:

Q Will you state your name, please?

A Wisdom, A. M.

Q And where do you live?

A I live in Oregon.

Q And what is your business?

[46] A Dairy equipment.

Q And who do you work for?

A Ross Holmes.

Q And how long have you been engaged in that business?

A I have worked for Ross Holmes about 8 years now.

Q And are you acquainted with Mr. Bernard A. Sakraida?

A Yes, I have known him many years.

Q Mr. Wisdom, I will ask you whether or not you had a telephone call from Mr. Sakraida at one time about your going down to the Mission Dairy in Gonzales?

A Yes.

Q Where were you when you received that telephone call?

A In Oregon.

Q And where did you understand he was talking from?

A Florida.

Q And do you know when this conversation took place; can you approximate a date?

A It was in 1971.

Q And what did he ask you to do about the Mission Dairy?

A He asked me to check and see if we had a washdown system of some kind and if it was in operation when they put it in.

Q And did you, pursuant to that telephone call, go to the Mission Dairy?

A Yes.

[47] Q And did you get to see what they had there in the way of floor washing equipment?

A No, I talked to Mr. Ripley.

Q Who is he?



A The manager of the dairy.

Q And what did he say to you?

A He said that he would prefer not to be involved.

Q Did he permit you to go in?

A Well, he felt at that time that it would be — that it wouldn't be right for me to go in.

Q Did he give you any information about it?

A No.

Q And what did you report back to Mr. Sakraida then?

A Basically what he told me that he would prefer not to be involved. I honored that because —

Q Did you make any further effort to find out about the Mission Dairy on behalf of Mr. Sakraida?

A No, sir.

MR. HULSE:

That's all.

CROSS EXAMINATION

BY MR. KOLISCH:

Q Are you from Medford, Oregon?

A Yes.

[48] Q And is Mr. Sakraida originally from Medford, Oregon?

A Yes, sir.

Q You have known each other for many years?

A Yes.

Q How long have you known about the Mission Dairy?

A I don't know for sure.

Q You knew about it before 1971, didn't you?

A Yes.

Q How much before?

A That's what I say, I don't know.

Q Were you aware that commencing in 1962 the Mission Dairy had taken on a major remodeling program?

A No.

Q Were you ever aware that Ross Holmes had supplied equipment to the Mission Dairy?

A Was I ever aware?

Q Yes.

A Yes, I was aware of it.

Q When did you become aware of that?

A Gosh, I don't know which year that would be.

Q Prior to 1971?

A Yes. It might have been sometime after I went to work for them.

Q When is the very first time that you ever visited the Mission Dairy?

[49] A They had an open house, and I don't recall the date.

Q Would 1965 refresh your recollection?

A I couldn't honestly say the date.

Q Are you familiar with the publication called the "California Farmer"?

A Yes, I've read it.

Q Let me show you a Xerox copy from the California Farmer of March the 20th, 1965 in which reference is made to the Mission Dairy, and ask you if you can identify that. Have you ever seen that?

A I don't recall it.

Q Does that date on the article there, does that refresh your recollection with relation to the open house?

A It is possible, because it looks like a fancy ad, I mean.



Q I will show you another document from North California Harvesters System and it is addressed to Mr. Gribble and Bennett, February the 9th, 1965. I will ask you if you ever received any notification similar to that.

A Not that I remember on this.

Q All right.

A I think that I would have remembered that if I had seen it.

Q Tell us what you saw when you visited the Mission Dairy [50] in 1965.

A If I visited it in 1965, well, let me rephrase that. When I was there I saw a very odd type of a Ross Holmes system. We had one milking machine in the center in the rear, two on the stalls in front, which I certainly hadn't seen before.

Q Don't you recall anything about that as a matter of fact that they did have an automatic flushing system in 1965?

A They certainly didn't, or I think I would have remembered it if it were in the area of the barn.

Q What about the holding pen?

A I primarily work with the milking end of it, and I can't visualize what that would be if it was there. But I think I would have noticed it if it had been in the front.

Q Did you discuss with anyone at or connected with Ross Holmes the Mission Dairy?

A You mean milking at the Mission Dairy?

Q Anything at the Mission Dairy.

A Yes.

Q What individuals?

A With Mr. Holmes and possibly —

Q Did you discuss with them the flushing system at the Mission Dairy?

[51] A I doubt it. I really wasn't interested in that end of it.

Q When were you asked by Mr. Sakraida to find out about the flushing system at the Mission Dairy? And you testified that Mr. Ripley wouldn't let you see it?

A I went down and asked about it, yeah.

Q And didn't you ever discuss then what that system was with anybody?

A No. There didn't seem to be any particular reason.

Q Well, at the time I am talking about, 1971, Mr. Sakraida asked you to get information on the flushing system?

A I don't understand your question.

Q I am now trying to find out if you discussed with anyone at Ross Homes after Mr. Ripley wouldn't let you see it?

A I don't think *I* did; I think I found Bud and told him I couldn't get the information.

Q As a matter of fact, without having seen the system, didn't you discuss it with Mr. Ripley just what kind of flushing system they had at the Mission Dairy?

A No.

Q Didn't you ask him?

A I asked him the time that he put it in, and I think I asked him if he had one.

[52] Q And what did he tell you?

A He said that he had rather not be involved.

Q I understand that, but didn't they tell you what kind of a flushing system they had there?

A No.

Q You never asked him, "What is your flushing system"?



A No. He seemed reluctant to discuss it at all.

Q What reason did he give you for not wanting to.

A The original reason, that he didn't want to become involved.

Q He knew about a lawsuit?

A Is that a statement?

Q I am asking you, did he say that he knew that it was because of a lawsuit, or why did he not want to become involved?

A He didn't say.

Q After you couldn't get the information from Mr. Ripley, did you make any other inquiries from anybody concerning the mission Dairy?

A (No audible answer.)

Q In fact, when you went to see the Mission Dairy, or went in 1971 or whenever it was that you made your visit there, didn't you know that they had a flush system similar to the Ag Pro system?

A No.

[53] Q You did not know?

A No.

Q You have no information concerning what the flush system was?

A No, not on the Mission Dairy, no.

Q I am not asking you as to dates, but just as to how that flush system operated, you had no information concerning that?

A No.

Q And it had never been the subject of any discussion with anyone at Ross Holmes?

A No. At least not that I recall specifically. My primary interest would be the milking machines and the operation of it.

* * * *

[54] EMIL ROVIE,

a witness, called by Mr. Tatem, having been first cautioned and duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. TATEM:

Q Would you state your full name, please, sir.

A Emil Rovie.

Q And Mr. Rovie, where do you reside?

A I live at Glendale, Arizona.

Q All right, sir, and where exactly is Glendale?

A Glendale is about 90 miles northwest of Phoenix.

Q All right, sir, and what is the nature of your business in Glendale?

A I am a dairy farmer.

Q All right, sir, and how long have you been so employed?

A I started dairy farming in 1943.

Q Did you acquire this farm from someone in your family, sir?

A I —

Q Or did you start it new?

A No, I started it new.

Q All right, and you started building the farm in 1943?

[55] A That's right.

Q And approximately what time did you complete it?

A In — I might say I left the university work — I had been in extension work — and I had bought this farm from a dairyman who had about a hundred and twenty-five cows at that time, and I went on with the land and the cows.



Q All right, sir. Did you construct a barn or change any of the operations from when you had purchased it?

A Originally, we milked in a little flat barn, and then after four or five years I built a parlour barn that we changed from the flat barn to the parlour barn.

Q All right, sir, and when is your best estimate as to when your barn was complete?

A That barn was completed in '47 or '48.

Q All right, sir. Other than the dairy barn, did you also raise any poultry or any other product besides the dairy?

A That is right. We produce feed for the dairy, and I also have a poultry operation about that same time.

Q Now was the poultry, where you housed the chickens, was that in close proximity to where the dairy barn was?

A Yes, it was. It was approximately a hundred feet apart.

[56] Q Now, Mr. Rovie, I want to inquire specifically with respect to the dairy barn that you had constructed in this land, and I ask you specifically, did you have any type of flushing system that you used to remove the manure off of the floor, a cleaning system to move cow manure off of the floor in your dairy barn?

A Yes, we did. We took advantage of the water that we had available from the irrigation well that we used on our land. We used this water and flushed it over our barn floor.

* * * *

[57] Q Sir, would you tell us what — with what substance the floor of the barn consisted of?

A All of our dairy barns were cement, concrete floors, and we used this water that we had available from the well and also from our irrigation district, and I had it in a cement-lined ditch, and we would raise the water level, the height it would flow out, over the floor, and wash the manure, the droppings from the cows, and clean it out.

Q All right, sir. Would you tell the Court whether or not there was any grade or slope in the floor.

A Yes. The floor was made to fall with one pass over the floor to pick up the manure and take it to a low point, and from that point the water would go back into another ditch below and go out to the field, and there we would use it to irrigate our fields.

Q All right, sir, would you tell the Court the system of how you released the water into the dairybarn?

A Water was released through four ports that we had into the dairy barn that we could manipulate with a wooden makeshift gate that we had, and the water level was raised, and when we wanted the cleaning action, we would release this water and it would flow over the sloping [58] type floor, and take the manure away.

Q Now, Mr. Rovie, do you have any engineering plans or diagrams of this area, of this dairy system?

A No, I had none particularly, other than we built it from know-how.

Q Where did you get the idea of this type of flushing system, sir?

A Well, I had studied it some at the university, and then from the time when I was a boy at home I knew that if we could throw a pail of water across the floor, it would do a cleaning job, and we did have this water



available from our irrigation well. We had our elevation was such that I got the idea that we could run this water across the floor and it would do this work for us.

Q Mr. Rovie, did I ask you to make a diagram of how your barn was?

A Yes, sir. I just penciled a sketchy diagram.

Q All right. May it please the Court, I would like to have it marked for identification. I have a copy for the Court and opposing counsel.

THE COURT:

All right. The Court Clerk will mark it.

(WHEREUPON, at this time, instrument marked for the purpose [59] of identification as Defendant's Exhibit A.)

QUESTIONS BY MR. TATEM:

Q Now, Mr. Rovie, I show you what has been marked for identification (indicating) as Defendant's Exhibit "A", and ask you what is that; can you identify that?

A Yes, that's the little sketch that I drew a rough sketch of the way the water did come in through our dairy barn and exited out carrying the manure with it.

Q And this is a diagram of the dairy barn as it existed what, at what point in time?

A This was in the area of 1950 up through — We operated this barn from 1950 on.

Q All right, sir. If we may, sir, we — if we could turn the diagram (indicating) where the notation of water supply is at the top, could we talk about it from that standpoint?

A Yes, sir.

Q All right, sir, now tell us what that means. Tell us what that means when you say "water supply." What are you referring to there?

A This is where our water did come through down a ditch and in this kind of a holding pattern where the water was held, was impounded at this point marked "Gate", we raised the water level at this point (indicating) and took it through our milk stalls and washed it [60] through.

Q All right, sir. How deep was this area that you are talking about where the water was impounded?

A This was probably two feet deep.

Q All right, and with respect to the side of the barn, would you tell us in your own words where this ditch was in connection with the side of the barn?

A It was outside the barn, on the back side of the dairy barn itself.

Q Did one side of the barn make one side of the ditch?

A Almost; I think a matter of a foot or two.

Q All right. Would you tell us about your dairy barn itself; that's to the right of where you are referring to?

A "Dairy barn," that's where the milking stalls were, and where the cows would come through the milking stalls, and with that we would wash with this water coming through here (indicating).

Q Now, looking at the diagram, what was the low end of the dairy barn?

A The low end of the dairy barn would be the right to where it's marked "Gates" and then the waste would go out at the lower-right of the diagram.

Q All right, sir. Now, what are these little four lines



that you have next to this trough by the side of the [61] dairy barn?

A That's the intake of water where we would impound the water, raise the level and let it flush across the floor.

Q A you familiar with the term "*weir* board"?

A Yes, sir.

Q Would you tell us what you know a weir board to be?

A Well, it is an opening, most generally a square type of opening that water flows through.

Q And how do you activate a weir board?

A You have a gate, and your water is behind the gate, and you lift or raise the gate, and the water goes through, and it flushes onto the floor and does the cleaning action of the manure.

Q Now, would you tell us in your own words what type of mechanism you had in between this trough and the dairy barn that the water had to pass through?

A It was just a square type of hole with a board, and you would raise the board out and let the water come through.

Q What size port was it?

A As I remember, the opening was probably about 20 or 24 inches wide, and maybe 6 or 8 inches in height.

Q Would you tell us what kind of plate or gate it was, whether it was metal or wooden?

[62] A It was wooden.

Q It was wooden?

A Yes, sir.

Q All right. Now, how did the system work once the water got to the dairy barn floor?

A Well, it would just wash off what droppings we had on the floor, because the surge of water would carry this water and manure to the gutter.

Q Where would the water go?

A It went down a gutter, and down by that dairy barn there, and drop into this gutter, this low point, and flow on rapidly out to the right, the low end of the barn, and go out through the manure drain and out to the waste ditch.

Q All right, sir. Now, what about near the bottom of your diagram where you had your chicken house, did you use any flush system for your chicken house?

A Yes, we had two cage houses; there was cage house number one and cage house Number two, and we used the same water system and we had 10 aisles in each of these cages, cage houses, and underneath the cages there was a cement trough where the droppings would fall from the chickens and fall into this, and then the water, we had a kind of a plug that would let the water down these aisles and wash the chicken manure, [63] the droppings, would go from the upper end of the house down to the lower end of the house and drop in and drop into this same drainage line, and on out to the field, and we used the same system for cleaning the chicken houses, also.

Q What are the little arrows at the top of the diagram "D-A", right there by the chicken houses, where the little arrows are?

A Oh, that's the direction of the flow of the water that would flow down these cage rows. We had individual cage rows, and that was underneath these cage rows we had it cemented, and the water would flow in that direction, a matter of about 200 — the house is about 225 feet long, and the water would flow from one end to the other and clean that chicken house.

MR. TATEM:

(Indicating.) Would you mark this "D-B".



(WHEREUPON, at this time, instrument marked for the purpose of identification as Defendant's Exhibit "B".)

MR. TATEM:

Your Honor, do you want to see this (indicating.)?

THE COURT:

No, no.

[64] QUESTIONS BY MR. TATEM:

Q Mr. Rovie, with respect to the face side of "D-B," can you identify that for us, please?

A Yes, sir, this is the head end of the — of — of our chicken houses, the head end of each one of those 10 rows. In the upper part of the picture we see the cages that the birds were confined in, and the bottom there is this concrete trough, and that's where the droppings would fall into and the head end of this trough we had a plug arrangement that we would pull out and let the water come out and proceed down this trough. This is the beginning of the trough there of each of these 10 troughs for each of the two houses.

Q With respect to the visual matters portrayed on "D-B," when was that completed?

A When was this built?

Q Yes, sir.

A This was built, oh, me, '46, '47, '48, in those years.

Q All right, sir. Now, prior to coming to El Paso, had you ever seen me before?

A Yes.

Q Can you recall approximately when it was?

A It was one day last summer that you came by the farm.

Q Do you recall that you were there when I took that picture?

[65] A Yes, sir.

Q Between 1973 and when that picture was, when that installation was completed, have there been any changes in it, I mean does the picture accurately represent the way it was when it was completed?

A That's right. This is correct. We haven't made no particular changes on it, and we've been using it all these years.

Q All right, sir. Now, with respect to "D-B", what are the baskets that are above this concrete trough?

A These are cages that we confine our birds in, and we have birds in these small cubicles that are roughly a foot wide and about 15 inches long, sloping floor, and the feed trough in front, and a basket to catch the eggs, a typical cage operation.

Q And what was the purpose of the concrete below the baskets?

A Droppings would fall from these chickens, and drop down, and originally we had to take them out with a wheelbarrow, and it was hard work, and then we conceived this idea of washing, so we did cement these aisles underneath there and use water velocity to wash the manure through.

Q All right, and how was the water introduced into the concrete trough?

[66] A This water came from the same supply system, and through there — we piped it into an underground pipeline to the head of this cagehouse, and with the head of each of these aisles we had this plug arrangement and we would open this plug and let the water come through, and it would flow down through the length of the aisle.



Q And how did you remove the plug from the top of the trough?

A We had a little tool that we would reach in and pull that plug out.

Q All right. I want you to look at "D-B" and tell the Court whether or not the metal tool you are referring to is depicted in that?

A Yes, it's here, that's the little metal tool (indicating).

Q All right, and tell us in your own words how you get the plug out with that metal tool.

A Well, it was a bent kind of a little metal tool that we would reach in there and pull this plug out, and it would let the water come out.

Q Now, Mr. Rovie, do you know of any time that your dairy barn or your poultry operation was written up or made public in any way?

A Yes, it was a matter of interest, and it was published in local newspapers, a newspaper cal`ed the Arizona Republican Gazette, I think it was called at that [67] time, on one of the Sunday editions.

MR. TATUM:

(Indicating.) Would you mark this, please, as "D-C".

(WHEREUPON, at this time, instrument marked for the purpose of identification as Defendant's Exhibit C."

* * * *

QUESTIONS BY MR. TATEM:

Q Mr. Rovie, I show you what has been marked for identification as Defendant's Exhibit "C" and ask you, can you identify that?

A Yes, sir. This was an edition in the Farm and Ranch Life of the Arizona Republic, August the 2nd of 1953, and it was kind of a almost full-page of my farm and the manure handling system that we had.

Q All right. Those pictures that are shown on that exhibit, are those pictures of the farm that you have been testifying about today?

A Yes, sir.

Q There is a picture of a gentleman in that article; is [68] that picture of you?

A Yes, sir.

Q And the substance of the documentary before it of how the author of that article obtained the information, did they interview you?

A Yes, they did. They came in and took pictures of it.

Q Have you had a chance to review that article?

A Yes, sir.

Q Is the article accurate about what it said that your barn did or did not do?

A Yes.

* * * *

[69] Q Now, Mr. Rovie, I am talking just about the part of the newspaper that pertains to your farm; I am not talking about the other articles that may be in there about some other collateral matter. All right, now, let's go back to Exhibit "A". This was the sketch of your farm. And particularly with respect to the



dairy barn, now, was the water that was in the water supply, was that continually moving, or were you able to store the water and dam it?

A We were able to store that water. We would dam it up with a gate to hold our water supply.

Q And it remained at rest in that position until what happened after that?

A Well, we would release this water, and we could use it to clean our milk stalls and go down through the chicken house and wash wherever we were at at the time.

Q And it was released through what, sir?

A Through a gate, or weirs.

[70] Q All right, you are using the word "gate" as synonymous with "weir"?

A Yes, sir.

Q And that is with respect to what on this diagram, or where?

A (Indicating.)

Q Those four little arrows?

A Uh huh.

Q Did you have four weirs or four gates?

A Yes, sir.

Q All right. How did you determine how many weirs to lift?

A Well, that was a matter of, you know, we would milk some cows, and then we would mix them with these gates here, and we would usually — We could clean the area by opening these gates here (indicating).

Q Would you tell us how, what's your information or what you recall as your contact with my firm, or how did we get together today, if you can recall?

A Yes, sir. *Herb Meyer* called me and asked me and

asked me about this. He evidently talked to somebody at the University of Arizona, and they gave him my name and he talked to me to ask me about this washing system and so I told him what we had done, and then it was later that you and he came to the farm to look at it.

[71] Q When was it that I came?

A Mid-summer of '73.

Q And I was introduced to you by what individual?

A By Herbert Meyer.

Q Do you recall that he called you and made some kind of arrangement with you?

A He did call me and said that you were coming.

Q At this time we would offer into evidence what has been marked "Defendant's Exhibit A". Also "B" and "C".

THE COURT:

Any objection to the offer of "A", "B", and "C"?

MR. KOLISCH:

Yes, Your Honor. Apparently this is being offered as some kind of prior art. They — We are entitled to 30 days' notice under the statutes, 35284, and this is the first time that the address of this individual —

THE COURT:

I don't know if it's being offered for that purpose, necessarily. I think it is just an offer to show that there is no basic novelty to your client's invention.

MR. KOLISCH:

[72] I'm sorry, that takes care of that specifically, but —



THE COURT:

This is not a trial on the merits; this is merely to determine whether or not — The only thing that the Court of Appeals has asked me to do here is to hear and question whether or not there should be a new trial based on newly discovered evidence. And, under Rule 59 B, that's all, the then I will either find if there is a basis for it, then I will order up this transcript and send it to the Fifth Circuit and file a supplemental brief, and then it's up to them. That's my understanding. I have a very limited role in this trial. I am reading, "to hear and determine defendant's motion for a new trial based on newly discovered evidence, to certify to the Court of Appeals the entire records, including the opinion and orders of the trial court, and the testimony taken on the new trial issue, and thereafter, it says, "We'll take over." Then you file supplemental briefs, and that is the limit. My hands are tied beyond that.

MR. KOLISCH:

You are not passing on —

THE COURT:

I am not passing on the merits of the [73] patent. I am going to do exactly what the Court of Appeals instructed me to do, and I just read here — And even then I am not permitted to go into the question of the trial on the merits of the infringement; that's got to go to the Fifth Circuit. They have to make the decision as to whether or not the patent is valid, and then if they feel like that there is a question of invalidity, it will be sent back and I will try it on its merits, afterwards, on the infringement question.

MR. KOLISCH:

I think that the Fifth Circuit indicated that the question of infringement would first have to be decided in the district court.

THE COURT:

But I am not going to hear that today.

MR. KOLISCH:

I understand that today you are not going into that, but —

THE COURT:

They tell me not to. They say that I am not to touch the question of infringement. As I said, the only thing I am permitted to do is determine the defendant's motion for new trial based on newly discovered evidence, and then to certify to the Fifth Circuit Court of Appeals the entire record, including [74] the opinion and order of the trial court and the testimony taken on a new trial issue. Then thereafter the parties will go back to the Court of Appeals and will file supplemental briefs, and then it goes on, and they will make the determination as to whether or not I will hear the infringement question. That, again, is all there is.

MR. KOLISCH:

I would still make the objection.

* * * *

[75] Exhibits "A", "B" and "C" will be received for the purpose of this hearing only, bearing in mind that I



am not passing on the merits. I think this would be a good time to take a recess. We'll be in recess for about 15 or 20 minutes.

(WHEREUPON, at this time, Court in recess for 20 minutes.)

THE COURT:

You may proceed to cross examine the witness.

MR. KOLISCH:

Your Honor, I will limit my cross examination and not go into any of the merits in the [76] construction operation of Mr. Rovie's dairy, because I have not had an opportunity of course to make any independent examination to determine anything concerning this dairy, so I cannot examine him on the merits of the dairy as such.

THE COURT:

You mean as to the merits of the usefulness of the particular operation he has for cleaning out his —

MR. KOLISCH:

Yes, sir, and whether in fact it is in anticipation of what the patent claims are, because I have not had an opportunity to examine it. This is the first time.

THE COURT:

Well, as I say, this is not a trial where all the merits can be determined. This is only a question of whether or not the newly discovered evidence could have been discovered by due diligence on the part of the movant prior to the other trial. And this is what — I am not sure

exactly what the purpose is. I think it was a very unusual ruling in that I am not sure in my own mind when I am supposed to find, if I should, if there was sufficient evidence, newly discovered, to raise a fact issue that would in [77] some manner overcome the validity of a patent, or whether they are going to make this determination based upon evidence which I adduce here in my courtroom, with my Court Reporter. They have no Court Reporter, and they can't make — They are not supposed to, as I understand. I understand what they say, and the door is open, and I am going to do exactly what my overseers tell me to do, and that is to hear the motion and then make a determination whether or not the evidence is newly discovered, and whether it is important, and whether it could overcome the validity of the patent. I don't know what the Fifth Circuit is going to do. I can't do anything; I think that's what they are going to do. I am going to hear all the evidence and be sure that they get a complete record, because they are the ones that are going to decide whether or not the patent is valid, and if they decide that it is invalid, that's the end of it, as I understand it. Or if they decide that, well, they may go a step further and find that there is evidence to show invalidity, they can send it back for a complete new trial, but I can't anticipate that. I know what they said, and I know what I am required to do, and I intend to do that, and we'll just see what the evidence is here. We are not going to try the entire case. I don't think I am [78] in a position until I determine whether a new trial should be granted to undertake the actual issues on either the threshhold question of validity or invalidity and second, the infringement. I am certainly a long way away from the infringement question, though. All right.



## CROSS EXAMINATION

BY MR. KOLISCH:

* * * *

[79] Q And did you tell others in the field specifically concerning your flush system?

A Well, not particularly. It was my own system that we used on the farm, and I am sure that some of the people knew about it, and the article told about it.

Q And, you made some reference to the extension service; is this in connection with the Arizona State College, or what?

A The University of Arizona, the Extension Service.

Q Yeah. And what connection did the Extension Service have with this installation of yours?

A They had no connection whatsoever. I did spend four years working for the Extension Service after graduation from the university.

Q And do you know whether the people at the Extension Service were aware of your dairy?

A Yes, sir, the people in the dairy department were aware [80] of my dairy and what I had done, and I think they were the ones that had told Herbert Meyer when they talked to the University people that I had done this type of thing.

Q That was my next question, as to how Mr. Meyer came to you.

A Yes, I think that the people at the university gave him my name. He called me.

Q And that was in the middle of 1973?

A Yes, sir, the early part of 1973, as I remember.

and he came to the farm there I think in July of 1973.

Q And I think you said that your — the flushing system in your dairy first went into operation in the latter '40's; is that right?

A That is right.

Q And has it been continuously in operation since then?

A We did run it up until about the middle '50's, and then we changed and built a new barn and new dairy barn over on Orangewood Avenue, and that's where we are operating at the present time.

Q What kind of a flushing system do you have there now?

A We have a somewhat different flushing system because we didn't have the same set of circumstances. Over there at the new barn we have a tank, a raised tank, and then we have water piped from that tank. We keep water in that tank that's approximately maybe 15 to 20 [81] feet tall, and we would take water from the tank and run it through a series of 4-inch pipes, and we had valves that we can pull with a chain, and we use somewhat the similar system, but not the same identical system that I had in the old original dairy barn.

Q Is this old system still in existence?

A No, it is not.

Q When did it go out of existence?

A It went out in the middle '50's, I think in 1955 or 1956, somewhere in that area.

Q Is there anything remaining of that old system?

A Yes, I think there are some of the old floors are there, and we do have our cage houses, our chicken houses. They are still there, and some of the underground pipes are there, and the —

Q But as far as you know —



A The chicken house, we are not using those because of the cheap price of eggs. We went out of that business.

Q All right, that's all the questions I have.

## REDIRECT EXAMINATION

BY MR. TATUM:

Q Just to clarify for the record, Mr. Rovie, the diagram marked "Defendant's Exhibit A", is of the old farm?

A Right.

Q And the old poultry house?

[82] A Yes, sir.

Q What is your estimate as to when you closed out the poultry house?

A The poultry house, I think it was probably in about 1967 or '68, somewhere in this area.

Q All right, and the new barn is — the new farm is at a different location, different land?

A Yes, sir, it is on what we call "Orangewood Avenue."

Q How many dairies are there in the Glendale, Arizona area?

A I am not sure; there are numerous dairies there in the Glendale area.

Q Could you give us just approximately how many dairies there are?

A Maybe in this area I would estimate maybe 15.

Q And the old dairy, how large of a dairy was that?

A The old dairy was — We milked about 150 cows.

Q The diagram "D-A," on that trough-like, up near the top where the dairy barn is, would you tell us for the record how far away from the side of the dairybarn it actually was.

A At that time it was right adjoining the wall of the dairybarn in the area of approximately a foot, the old ditch used to go through there and it was as close as we could build it there.

[83] Q And between the ditch and the side, was that where the gate was?

A Yes, sir.

Q All right.

MR. TATEM:

Thank you, Your Honor. I would ask that the witness be excused if he may.

THE COURT:

All right. Is there any objection to excusing this witness, gentlemen?

MR. KOLISCH:

I just have one or two more questions.

RECROSS EXAMINATION

BY MR. KOLISCH:

Q I don't think we identified who the Mr. Meyer was that you were talking to; was he Mr. Herbert Meyer from Mission Dairy, or do you know?

A I don't know his connection.

Q You know his name, but he didn't identify what connection he had?

A No, sir.

Q Do you have any photographs of your own concerning the flushing system that you have been testifying about?

A I —

Q I am talking about outside of the newspaper, you do [84] not have any photographs?



A No, sir.

Q Do you have any other records concerning that — the existence of that?

A No, sir.

* * * *

FRANK FRANCES SOUZA,

a witness, called by Mr. Tatem, having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. TATEM:

Q Would you state your full name, please?

A Frank Frances Souza.

Q Mr. Souza, where do you reside?

A Well, my residence is in *Hillmore*, California, and [85] business is in Turlock, California.

MR. TATEM:

All right, would the clerk mark this "D'd", please?

(WHEREUPON, at this time, instrument marked for the purpose of identification as Defendant's Exhibit "D")

MR. TATEM:

For the record, Your Honor, attached as Exhibit "D", to Defendant's response to Appellant's reply to Petition for Rehearing, was a telegram, and that's what I am going to ask him about.

THE COURT:

In order to save time, Mr. Tatem, why don't you mark all of the exhibits that you plan to offer or tender —

MR. TATEM:

All right.

THE COURT:

— at this time, and you can present them to counsel and you can take them from him as you have your witnesses testify about them and as you wish to tender them.

MR. TATEM:

Yes, sir.

(WHEREUPON, at this time, instruments marked for the purpose [86] of identification as Defendant's Exhibits "E" and "F".)

BY MR. TATEM:

Q Now, Mr. Souza, do you recall in 1973 sending me a telegram?

A Yes, sir.

Q I direct your attention to Exhibit "D"; is that the telegram that you sent to me?

A Yes, sir.

Q Now, the telegram refers to 28 years' experience in dairy construction?

A I started 28 years ago. I was off for, oh, about a year and a half, and I came back into it.

Q All right, sir, where was that construction, where in the United States?

A The first one I worked on was my brother's job, Harry W. Souza.



Q And your brother you say is who?

A Harry W. Souza.

Q All right, and where did you learn your profession?

A That's where I started, in about 1946.

Q Okay, and you have been doing dairy construction ever since that day?

A Other than about a year and a half that I was off, but I come back and have been with them ever since.

Q All right. Are you required to be licensed by the [87] State?

A Yes, sir.

Q Where are you licensed?

A California.

Q And you have been since what year?

A I was co-partner with D. B. *Balls* for approximately a year and a half or two years, and got my own license in 1954, I believe. I never checked the record, but I think it was in 1954, if my memory serves me correctly.

Q Of what year?

A 1954.

Q . All right. And what is the nature of your profession today?

A Building contractor.

Q And do you have a firm in California?

A Yes.

Q And what is the name of the firm?

A Frank F. Souza, Incorporated.

Q And how long have you been practicing your profession?

A Well, steadily since 1948.

Q All right, sir, and approximately how many dairy barns have you constructed in that period of time?

A I have no record of it, sir. Well, in the last four years, well over a million dollars a year, and back there I was probably doing a couple of million dollars.

[88] Q All right, sir. Your telegram refers to your knowledge of water-flushing methods since 1946.

A Yes, sir.

Q And where was the installation that you refer to in your telegram, that was installed in 1946?

A My brother's, Harry.

Q And where was that located?

A In West Turlock.

Q In Turlock, California?

A Correct.

Q All right, and in what part of the state is Turlock?

A Oh, about the middle of it, I would say.

Q All right. Do you have any engineering plans or blueprints of that dairybarn in 1946 that was Harry Souza's place?

A No, I don't have them at this time.

Q All right. How long —

A At that time we used to use what we called the "university plan," and then modified it with the local health inspector's approval.

Q What do you mean by the "Universal plan?"

A That refers to farmers plans that required the standard code for the dairy industry.

Q Would you tell us generally what kind of dairy this was, this one of Harry Souza's back in 1946.

[89] A Grade A dairy setup, meeting all the requirements of the State of California in marketing milk.

Q All right, and would you explain to us the flushing system that they had?

A Well, the law calls for curbs being around the



holding corral area, so to stop the manure from sticking to the floor, we would form a weir board system in the curb, which would contain the water, to stop the manure from adhering to the floor, and we would pull this weir board, and this would — this water would leave and take the manure along with it and then it would go into a pump system that would go into this irrigation ditch for approximately 160 acres — I'm not sure.

Q Mr. Souza, did I ask you to draw us a diagram as best as you could about the 1946 dairy?

A Yes, you did.

Q And I refer you to what has been marked "Defendant's Exhibit E," in front of you. Can you identify that for us?

A Yes, sir.

Q What is that, sir?

A That's the layout of my brother's ranch at that time.

Q Would you tell us, on the diagram, where is the weir board that you are referring to?

[90] A Well, let's put the milk room, wash room and equipment room in an orderly position, and then the breezeway and the barn. South of the milking barn is a holding corral, and then there was a hay barn that evened out. On the — There was what we call a "control lane" to bring cows to and from the milking barn. This water would go down the control lane about 60 feet, approximately, and I am just guessing at that figure of 60 feet, and would go into a gutter and into a pump, which is about 400 or 500 feet away, and this pump would pick it up and put it into this irrigation system.

Q All right. Where was the water held on the diagram, Defendant's Exhibit "E"?

A Well, if you noticed, in order for the hay barn,

what we call the "control lane," there is a fence line there, and it comes right south of that line — I drew a dash line there.

Q All right, would you draw a circle on your diagram for us, please, as to where the weir board was?

A (Doing so.)

Q All right, and tell us as best you can what happened — Would you draw it on the Court's copy, too, please?

A (Doing so.)

Q First, how would you activate the weir board; how did you make it move?

[91] A The wier board?

Q Yes, sir, how did you make it move?

A You just pull it out.

Q You just pull it out.

A Yes, sir.

Q All right, and what happens when you did that?

A Water would take off down there.

Q Take off down hill?

A Yeah.

Q Where was the water before you pulled out the weir board?

A In the holding trough.

Q All right, and how high was the holding corral, the size, approximately, the side of it?

A Well, the code at that time required 6 inches. Back then, probably, guessing, probably about 14 inches.

Q All right, sir. What kind of floor was in this barn?

A Concrete.

Q Would you tell us in your own words, was it flat, or level or sloping, or what kind of floor was it in there?



A The milking barn, or the holding corral?

Q The holding corral and this holding lane.

A Well, the code at that time required that you had to slope a minimum of one inch to ten feet. If my [92] memory serves me correctly, I think we allowed an inch and a half to ten feet.

Q All right, sir, and then as to — as the water came through the weir board, where did it go?

A Through that control lane in into that pump.

Q All right. On the diagram, where was the gutter, and tell us what was it for?

A The gutter went through the exercising corrals, or the feed lot corrals, if you want to put it that way. But this was west of this about 400 feet approximately.

Q Okay, and what was the purpose of raising this weir board and allowing this water to pass over the control lane?

A To help clean that control lane.

Q Of what, sir?

A Manure.

Q All right. Now, where did you get the idea of damming water with a weir board?

A Well, my brother got the idea. He brought it to me, and I decided to exercise it in other jobs in other locations.

Q Was your brother older or younger than you?

A He was quite a bit older than I was.

Q And you all grew up on a farm?

A Yes, sir.

[93] Q And you all had seen it done before?

A He took me and showed it to me what he wanted done.

Q All right. And subsequently, you used a what you refer to as a "washdown" in 1949?

A '49, that's when I went into the business, sir.

Q All right, sir, in 1946 you were just working on your brother's place?

A That's correct, sir.

Q And in 1949, what happened at Frank *Mechado's* place?

A I was working for D. B. Balls, and shortly after that I became a partner with him.

Q And what kind of company was that?

A Construction.

Q Construction?

A Dairy barns, homes, that kind of thing.

Q All right, sir, and look at Defendant's Exhibit "F". And do you have any engineering plans or blueprints of this dairy that was built in 1949 at Frank Mechado's place?

A No, same thing, university plans, provided by the Health Department.

Q There is nothing on file that you have in your office as to what the actual layout was?

A No, sir.

Q Did I ask you to draw us a sketch or diagram as to how [94] the 1949 dairy looked?

A Yes, sir.

Q Look at Defendant's Exhibit "F".

A (Doing so.)

Q Can you identify that?

A Yes, sir.

Q And can you identify that, sir?

A Yes, sir.

Q What is it?

A Frank Mechado's setup that I drawed there.

Q All right. Is there any difference in this layout than what had been done in 1946?

A The direction is all, but these are the same.



Q What type of floors were installed? In 1949.

A Concrete.

Q Tell us about the contour, the shape of the floor.

A It all sloped to one corner, and the hay barn was right east of this holding corral; it fed around three sides, and the water would clean the water off of the back side, but not the other two sides, and take it into a pump and then it would be pumped out to a holding pond or sometimes into the ditch.

Q All right, sir, and what kind of mechanism in the 1949 dairy, Defendant's Exhibit "F", did you have to hold the water?

[95] A Weir board.

Q All right. Would you take a pen or pencil and circle on Defendant's Exhibit "F" where that weir board was.

A (Indicating.)

Q Was it activated the same way?

A Yes.

Q All right, you just pulled it up?

A Yes, sir.

Q And what happened to the water in the 1949 dairy?

A It ran on down to where the pump is.

Q And what was the purpose of raising the weir board?

A To let the water out of the holding valve and clean out the back side of that area.

Q And to clean the dairy of what?

A Manure.

Q From where in the dairy?

A The hay barn area. That control lane was dual-purpose. He fed also around this area.

Q As you constructed one of these dairy barns,

your company, did you make and file the blueprints of what you had done?

A Not at that time.

Q All right, and at approximately what time did you start filing the blueprints of how dairies were built?

A (Pause.) Nine or ten years ago.

[96] Q In the mid '60's?

A Yes, mid '60's, I would say.

Q All right. How was the layout or the diagrams of the barn passed down to you; how did you learn what had been done?

A Well, talking over with different customers, different craftsmen, and being in the trade and practicing it myself.

Q All right, sir. Approximately how many dairies are there in the Turlock, California area?

A (Pause.) I don't know the number, but I know there are an awful lot of them. I think *Stanislaus* County is the Number Three county, and I believe *Mercett* County I believe is Number 4 or 5 in California, and my — I mean I have no way to tell you the number. The average in Stanaslaus dairy size is about an average of 227 per dairy, I think.

Q All right. What size dairies were these that you had referred to in your telegram and today.

A They started out at that time only being 100-cow dairies, and it has been multiplied several times that since then.

Q From your experience as a contractor, do you regard that as a relatively small, medium or large-size dairy?

A At this time?

[97] Q Yes.



A Small.

Q Do you recall how you first got my name or my firm's name with respect to this case?

A I believe Herb Meyer got ahold of me first, and I believe you called me shortly after, if my memory serves me correctly.

Q All right, and approximately when was that?

A In March, I believe it was, of 1973.

Q All right, and you believe that Herb Meyer was the link, so to speak, of getting in touch with me?

A Yes.

Q You had never met our firm before?

A Not Herb Meyer or you at any time.

Q Before 1973?

A No.

Q All right. So far as you can recall from memory, are the exhibits "E" and "F" accurate as a diagram or sketch of the floor plan?

A That is correct, of that area.

MR. TATEM:

Your Honor, we would ask that Exhibit "E" and "F" be admitted.

THE COURT:

All right. Are there any objections?

[98] (Pause.) They will be received in evidence.

All right, you may cross examine.

MR. KOLISCH:

Once again, Your Honor, I will not cross examine Mr. Souza on the merits of the construction of these dairies he's testified to, because this is the first opportunity that we have had to get any information.

CROSS EXAMINATION

* * * *

[99] QUESTIONS BY MR. KOLISCH:

* * * *

[100] Q This floor plan, Exhibit "F", this dairy is no longer in existence, this flushing system? As Shown?

A That dairy is in existence, but not that particular type of system, no. Neither one of these are.

* * * *

[103] MR. TATEM:

For the record, Your Honor, the Clerk tells me that "D", which is the telegram, has not been introduced, and I would offer it.

THE COURT:

All right, it will be admitted.

(WHEREUPON, at this time, instrument marked for the purpose of identification as Defendant's Exhibit "G".)

CHESTER FLEET WHITMORE,

a witness, called by Mr. Tatem, having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:



DIRECT EXAMINATION

BY MR. TATEM:

Q Would you state your full name for the record?

A *Chester Fleet Whitmore.*

Q And where do you reside, sir?

A I was born and still reside at the present time in Modesto, California, but I am temporarily in San Francisco. Modesto is my residence, though.

Q All right, sir, and what is the general nature of your occupation?

A I retired when I was 65.

Q When did you retire?

[104] A In the year 1971.

Q All right, sir, and before you retired, what was the nature of your profession?

A I was a night watchman for Modesto Irrigation District for seven years, and prior to that I spent 33 years in the Grade A Dairy business. Farming.

Q All right, and where did you — Where were you involved in the dairy business?

A From 1929 until 1953 I operated a dairy, a Grade A Dairy, on Bridgemore Avenue in Modesto, California, and in 1953 the farm was sold for a subdivision, and I built a new dairy on a newly purchased piece of land on *Cosner* Road, Modesto Irrigation District. I farmed the Grade A dairy there until 1962 when I sold it.

Q With respect to the property that was on the *Crosner* Road, did that dairy have a particular name that it went by?

A At that time it was known as "Whitmore Dairy," sir.

Q All right, and that was in Modesto, California?

A Yes.

Q All right. Would you tell us what kind of dairy that was?

A I built that up to a Grade A operation and corral feeding, and Jersey cows —

A How large a dairy was it?

[105] A We milked 120 cows there on the average.

Q All right, sir. Now, with respect to cleaning systems, did you have any particular type of floor cleansing system or flush system there at the dairy at Modesto?

A In the first dairy I was constantly plagued with the floor cleaning, and I realized that I needed something like that, so I planned for a long time to have a better one and to install a flush system. I had to do this by observation and using my own improvision.

Q All right, sir. Would you tell us actually where you got your ideas to build your new dairy?

A I went to several dairies that I had heard had forms of flush systems, and investigated at the Elwin Young dairy situated on *Standeford* Avenue in Modesto, and another one, I do not know the name of the owner, or recall it at the present time, and they both used flush systems.

Q All right. When you use the word "flush system", what do you mean by that?

A I mean using a lot of water to carry out the manure, both the fibers and the paste kind, and take that, remove it from the floor, usually in the holding pens where cows are held in large numbers.

Q How was the water contained or held?

A In most cases the water was contained in a shallow wall [106] around a flat floor, and drain toward the opposite end of the barn.



Q And how did the water get onto the floor?

A From three different sources. One from the ice machine, which was water which was water-cooled partly, one from the cooling coil for cooling from animal temperature down to 38 degrees required by law, and the washing of the cows' utters, and the other was pumping plant into this holding tank.

Q How was the water released to wash?

A The Elwin Young dairy it was simply pumped through there and washed on out with a nearby pump at one corner, and the other one I saw it was pumped into a cement-lined ditch and then it was taken through the holding pen and on out through a continuation of the ditch at the lower grade.

Q All right. With respect to the new dairy that you built, what ideas did you try to use, just with respect to the flushing system in your new dairy?

A In the flushing system in the new dairy, I bore in mind the fact that this manure would accumulate from the evening milking and the next morning milking, and if it's allowed to dry on a dry floor, it would be very hard to remove, and since it was long hours at work and I had to do the most of it, I would impound [107] the water and droppings in this holding tank and held it with a tapered wooden plug.

Q And how high were the sides to your holding corral?

A Roughly 8 or 9 inches.

Q And what kind of floor was it?

A It was a concrete floor, and it was all graded to the point of the plug was the low point.

Q The how was the water released?

A It was released by simply prying out the little wooden plug and that released it.

Q And then the water did what?

A It flushed right on down through the long cement-floored feeding area. The feeding area was 13 feet wide; it was 227 feet long at first, and then I extended it as our dairy grew, and it continued on and flushed on into a manure pit at the lower point.

Q Did the manure wash down with the water?

A Yes, sir.

Q Did you have any engineering plans, or do you have any engineering plans or blueprints of this dairy that you are testifying about that you built in Modesto?

A No, but I have had a little mechanical drawing in school, and I planned it myself and had my tractor man make the fill and grade according to my ideas.

Q All right. Since you have come to El Paso, did I ask [108] you to draw a diagram of that barn?

A I drew a diagram because it was my custom to explain what I can't very well put in words.

Q All right, sir. I will ask you to look at Defendant's Exhibit G, which is in front of you, on the yellow sheet of paper, and I ask you, can you identify that?

A Yes.

Q And what was that?

A That was a schematic drawing I made of my operation there looking down to the left is north, the milk cooler area to the manure pit, approximately a 3-foot fall, and about 450 feet distance.

Q All right, sir, now where was the dairy located that is depicted on Defendant's Exhibit G?

A It was on the right-hand or south side of the drawing.

Q Maybe my question wasn't clear. In what state or city was it built?

A It was located at Modesto, California.



Q And when was it completed?

A It was completed in the fall of 1953.

Q All right, sir. Now, directing your attention to the diagram where you have "holding pen," and —

A Yes.

Q And then to the left of that you have an arrow showing "plug."

[109] A Yes.

Q Now, would you tell us in your own words with respect to this diagram how that worked?

A It worked by inserting a plug and filling in with a burlap sack to make sure that it didn't leak very much, and the water was admitted from the outside source, or deep-well pump, as I have indicated at the right, lower-right area of the holding tank. I turned on an electric pump and filled the pen with fresh water. Then the cows were driven in and there they could wash their feet off, and be ready to go on into the milking barn, and then more water was added to it.

Q What — Once the holding pen was filled, was the pump left on?

A Not until the cleanup operation.

Q All right, and then as you pulled the plug, what happened?

A I had a very lively flow of water there, and the water would recede all over the pen in the opposite direction from the opening.

Q And go to the left on that diagram?

A Yes.

Q Now did your dairy barn have any gutters or drains?

A There were low points or gutters, per se, that drained through into the holding tank, all the other sources [110] of water from the ice machine, from the

milk cooler, and washing the manure through the grates, all drained into the holding tank.

Q And then it went to the left down where, sir?

A It went down through the feeding area, the cement walk behind the feed mangers, and then on north, or left in the diagram.

Q Now looking at your diagram which is Defendant's Exhibit "G", to the left of the holding pen you have "walk and feeding area."

A Yes.

Q Was all of that concrete?

A Oh, yes.

Q And was the holding pen uphill from where the walk and feeding area was?

A Yes.

Q All right. Do you know whether or not your dairy there at Modesto was ever written up in any farm journals in the California area?

A Oh, yes, it created a lot of interest and was written up by Mr. *Elam* for Dairy Journal, *Hoards* Dairyman, and the Modesto agricultural news section.

Q All right, sir. I direct your attention to Exhibit "H", which is in front of you, and — (Indicating)

(WHEREUPON, at this time, instrument marked for the purpose [111] of identification as Defendant's Exhibit "I".)

QUESTIONS BY MR. TATEM:

Q Exhibit "I", and ask you, can you identify that for us?

A Yes, that was my dairy at Modesto.

Q All right, those pictures that are in that article, is that the dairy that you have been testifying about sir?



A Yes, sir.

Q Are you — Are those pictures taken of the dairy that's exemplified on the diagram, Defendant's Exhibit "G"?

A Yes.

Q All right. Where did the text of that article come from; I mean were you interviewed by the writer of that article as to how did the dairy work, or how it got it's name?

A Yes, he asked me all kinds of personal questions, and to review this, in the first place, I worked out the details of building the dairy with the assistance of George *Strauss*, who was the Agricultural Extension specialist in dairys in the county, and George was very enthusiastic about it. He wanted the general information passed along to the public, so he asked me to cooperate and give this some publicity, as it [112] would be helpful to everyone reading it, to maybe figure out a better way.

Q And apparently this initial article came out in 1957?

A Yes.

Q And I am referring to Exhibit "I", which is the article in the Hoard's Dairyman?

A Yes, sir.

Q Do you recall any other articles where your dairy was written up?

A I think the first article appeared in the Modesto Daily Agricultural News Section which is carried on the weekends.

Q What was that, a local newspaper?

A Yes, published in Modesto.

Q All right. Look at Exhibit "H". Is that the same dairy that was written up with respect to Exhibit "I"?

A Yes.

Q Do each of those articles appear to be accurate representations as to the way your dairy was and the way it worked?

A Yes.

Q Did you have a chance to review those articles?

A Oh, yes, I have seen them. I have them in my files at home.

Q And is it an accurate description and pictoral display [113] of the way your dairy worked after it was completed?

A Yes.

Q Mr. Whitmore, do you know the background as to how I got to meet you; do you know who my link was as to how we met?

A Yes. I know most of them now.

Q When was the first time that I did meet you?

A That was last summer at the trailer court at Modesto.

Q All right.

A You came there one day and interviewed me and asked me where this dairy was located, and stated the purpose.

Q And have you looked at the pictures of your dairy?

A Yes.

Q All right, and do you know how I got your name, what the link was between my firm and you, how we found you?

A It was through research and through contact with one of the gentlemen who appeared as a witness.

Q Could you identify that man's name for us, please?

A You would have to refresh my memory on it.

Q Well, is Herb Meyer, is that —

A Yes. Herb Meyer, that's who.



Q Your Honor, I would pass the witness and ask that exhibits "G", "H" and "I" be introduced in evidence, with the request that I would substitute a photostatic [114] copy of the newspaper article. I would like to return that to him.

THE COURT:

Are there any objections as to substituting a copy for the originals? All right, the copies will be received in evidence. You may cross examine.

MR. KOLISCH:

Subject to the same reservation that I made with respect to the other witnesses.

CROSS EXAMINATION

BY MR. KOLISCH:

Q Mr. Whitmore, during what period of time was your dairy that you have been testifying about, and particularly the flush system, in operation?

A I started using it as soon as I moved the herd to the new dairy, and we were there until November 1962 I sold it to another party who has used it until just two years ago, 1971.

Q I take it the flush system about which you have been testifying is no longer in existence?

A No, the dairy is still being operated, and they are using it the same way.

Q The flush system is still in operation.

A Yes.

* * * *

[115] Q I noticed in this photograph, Exhibit H, and I, the statement said that the hired man begins sweeping the floor of the corral, and the hired hand operates a pusher board which loosens the material; is this a correct description of the operation?

A He used a pusher board first, and after the water receded — We never operated it except right at the first. It wasn't successful without the introduction of more water than we had there. We would have to use water, and then deflect the water from the duckbill outlet of the pump which supplied 800 gallons per minute, and we would deflect that with this pusher board, and then sweep it when the thing was all drained out, and the pump was shut down.

Q By "sweeping," are you referring to pushing this pusher board along the lanes?

A Yes.

* * * *

[119] REDIRECT EXAMINATION

BY MR. TATEM:

Q Mr. Whitmore, approximately how many dairies are there in the Modesto, California area?

A I have no idea, except that as an oldtimer there, I would suggest there might be anywhere from 300 to 1000.

* * * *

Q All right. The picture of the man using the push board in the exhibit, I believe it's "I", what was the purpose of that flat board there with respect to the flowing of the water?



A That was to deflect and increase the velocity of the water flow, because there were certain parts of the droppings that would stick to the floor and took a lot [120] of volume all the way down, and we never had enough water to carry it. It had to be used all the way through whatever area you would desire to clear.

Q Thank you very much.

THE COURT:

You may be excused. Call your next witness. How many other witnesses do you have? Bear in mind, gentlemen, that this is not a trial on the merits. I need to decide whether or not you exercised due diligence and whether it's sufficient to overcome the presumption of validity. That's all I am interested in. I think we are going into a lot more detail than what I thought we were.

* * * *

HERBERT G. MEYER,

a witness, called by Mr. Hulse, after having been first cautioned and duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

[121] BY MR. HULSE:

Q Would you state your name, please.

A Herbert G. *Meyer*.

Q Where do you live, Mr. Meyer?

A I live in California.

Q And what place in California?

A *Carmell*, California is my home and residence.

Q And what is your occupation?

A I am a ranch manager.

Q What kind of a ranch, and by what name does it go?

A Well, the ranch is known as the "Herald Ranches," has several different divisions. The division we are talking about here is the Mission Dairy.

Q I will ask you whether or not you are the owner of the Mission Dairy in California?

A No, I'm not the owner.

Q Who is?

A It's in a trust.

Q It's in a trust. I will ask you whether or not you have been familiar with the Mission Dairy for several years?

A Yes, I have been familiar with it ever since I was a little boy.

Q And Mr. Meyer, directing your attention to a time that I believe will be around 1961, did you have any [122] plan that you originated for the Mission Dairy around 1961?

A Yes, sir.

Q Briefly, what was it?

A Well, the opportunity — Well, first, the dairy was on our property, which was leased out to another tenant, and he was retireing, and I had the opportunity of buying the dairy operation.

Q And did you have any plans in connection with acquiring the dairy?

A Not knowing anything about dairies, I approached it from an economic standpoint, and had to analize what was needed in order to make it a profitable operation, what we would have to change, what we would have to look for in the future, and in 1961 and '62 the dairy industry in California was in



very bad shape, and this dairy had good breeding, good potential, but being unfamiliar with the economics of it, I had to make a study of it, which I did.

Q How many head of cows had then been milked, at that time?

A Until that time we had been milking about 300 cows.

Q And since that time how many have you milked?

A About 650 at the present time.

Q All right.

[123] A The production when I took the dairy over was about 450 pounds of butterfat, and now our production is about 650, 680 pounds of butterfat.

Q Did you make any investigation of the design and use of other dairies before you did this one in '61?

A Yes, I did. I spent a lot of time looking at other dairies up and through the State of California, and also we were building a feed mill at that time and some other equipment, so I had a chance to go down to Arizona.

Q And your educational background is what with respect to agricultural business?

A I graduated as a mechanical engineer from the University of California, was in the Navy and did electronic engineering, and after the Service I went back to take another year of agricultural engineering, and then went back to the University of California at Berkeley and took post-graduate work in business administration.

Q And while you were investigating other dairies, I will ask you whether or not you saw any of them that used a flush system to clean the dairy barn floors?

A Well, there were a lot of different methods used that I did see, pieces of all of these, and I did see dairies

that used flush systems at one place or another.

[124] Q Would you tell us the names of some of these dairies where you saw a flush system at one time or another?

A Yes, the first one that comes to mind was the *Clayman* Dairy up in *Lodi*. I was familiar with the engineers up in the University of California, so I consulted with them with regard to getting equipment. Primarily I was interested in the dairy milking machines, the layout, and they had sources of information available which they passed along to me, and one of the dairies which I visited was either the *DeCarli* Dairy or the *Klaus* Dairy in Stockton, and that had a drop gate, a small drop gate system involved in its operation. *DeCarli* was a dairyman and a farmer that was written up in many magazines in California, and was accredited with being way ahead of his time as far as the ingenuity he used on the dairy. I also visited Mr. Whitmore's dairy and observed his operation. I also visited the *Max Foister* Dairy, which is close to this other one, and many other dairies throughout California.

Q Now, with respect to that Clayman Dairy out here, you called it, what kind of a flush system did they have there?

A They used a pump and they had valves in the floor, and they would take the valves off and let the water come up through the floor as in an irrigation system, and [125] flush down their barns and lanes with that kind of a flushing system. This was in 1960.

Q I will ask you whether or not they used gravity in that connection.

A It was gravity; the water bowled out, and then flushed the floor.



Q From what source?

A From a well pump. And I was giving this consideration as far as cleaning our barn was concerned, because we, too, were in a large irrigation operation, and we could have done the same thing.

Q And at the *DeCarli* Dairy, you said something about a drop gate, can you describe that for us briefly?

A Basically, as I recall it, there was a tunnel more or less where the cows came up, and in it was a small gate where he flushed down his milking equipment, the water gathered there and flushed down the small lane. It was an inaccessible place.

Q But this was a drop gate?

A Yes, sir.

Q And did you see the Whitmore Dairy, you said?

A Yes. Really, the Whitmore Dairy was the basis of my idea, as far as what we ultimately ended up with. I received an article from a secretary which was in a dairyman magazine in California, published by a Mr. [126] *Elam*, and that article showed pictures of his dairy and holding tank and his lane where he fed his cattle, and his disposal system for the manure. I started in the early part of '61, then, designing the barn and the equipment to be used, I was pretty far along as far as my opinions were concerned as to how to go about the innerworkings of the barn and the manure disposal. I had been by to see the *Foister* Dairy earlier in '61. I started my operation in July, and it was a twin parlour barn, which was what I was going to make our barn. However, they had just opened it up, and it was still under construction, and I was going to come back and see what they had done after they had some experience with it, and when I saw that article in the magazine, I took that opportunity to go by Whitmore's

and Foister's Dairy, and that's where my ideas jelled, as far as I was concerned with respect to our method of flushing system which we used in our dairy operation.

Q Would you state specifically what it was about the Whitmore Dairy operation that gave you an idea for something that you could use in rebuilding or making a new operation out of the Mission Dairy.

A The Whitmore Dairy had a holding tank right off of his milking parlour. When he would wash this milking parlour, the water would flow into the tank. He had [127] a curb all the way around except for a small section possibly two feet wide in the concrete lanes. He had a wooden plug with burlap to cover the opening, and the cows would walk over this 8 or 10-inch lift without any difficulty. Later he would pull out the plug and the water would surge down this concrete apron, cleaning the manure, and it would sump into a manure sump.

Q And what part of your setup did this give you the idea for?

A Well, primarily what I was after was a labor-saving device, or devices, and up until that time our old flat barn was cleaned out in the old way and carried out in feed carts something like the old mechanical mining carts that you have, and there were two feeders. The water flushing system was an improvement over this older method. It was done the old way ever since I was a little boy.

Q And how old are you?

A Forty-nine.

Q Go ahead.

A That dairy is about 60 years old, but anyway, they would take a high-pressure hose and hose it down.



Q With respect to the DeCarli Dairy, did you see that yourself?

A Yes. I tried to go look at it, but it's been taken out.

[128] Q Was it a new or old dairy at the time you saw it?

A It was a very old dairy, but it was written up for the modern things this many had done.

Q You saw it at the same time you saw the other dairies?

A Yes, that's right.

Q Did you see it in action?

A Yes.

Q When the gate was opened, or dropped, was the action slow, or surge, or slow, or what did it do?

A It was a little gate. It was dropped and the water would flush out.

Q In the floor that was in front of it?

A Yes. I got the idea from Whitmore's operation, and I got the idea that we could put a gate at the end there and impound the water, and give us our surging action, and volume, and I would operate it with a hydraulic ram operated from the milking pits, and it would be automatically controlled, and the reason for having it controlled is that in our operation sometimes the cows would come in in the winter time with heavy mud on their feet, and we would open the gate partially and let some of the water flow out, and not get the full surge, and we had it under this high-pressure ram so we could drop the ram and let it come out gradually or surge.

[129] Q I will ask you whether or not you got your ideas from the other dairies that you saw?

A Yes. I got my ideas from them and improved on those.

Q Who first sketched out the design or plan for your barn?

A I did.

Q And what, if anything, did the Soil Conservation people have to do with that plan or design?

A Somewhere in September or August of '61, I contacted the Soil Conservation people to help me lay out my plans, because from the engineering, and the grades and so forth, they copied the entire area and we calculated our cuts and fulls and how we could shape our corrals. All of my records were destroyed by fire except the fireproof cabinets, and so I went to the soil conservation office and they had a plan dated in January of 1962, so they had the plan complete at that time.

Q And do you know when you began purchasing equipment for it then?

A Yes. I will have to refer to my notes to get this exactly right. Well, first of all, I forgot to mention that in California we have a State Dairy inspector, and all of our plans have to be approved by the state before we can make any construction. So I have his records which indicate when I first met with him. I met with [130] him on November the 18th, 1961, as his records show, to discuss corral planning, which was about the time that the Soil Conservation people were doing the work for me, and I contacted Mr. Bill *Holm* on December the 5th, 1961, to go over his equipment with him and set up a meeting which we had sometime in December, and I then purchased the equipment and let the contracts for it by December the 16th, 1962, and January the 2nd, 1963 I have the permit from the dairy inspector, the official permit, and on February the 25th, 1963, I let the contract for fully automatic stalls



with the Ross Holms People, and on March the 15th, 1963 Mr. Young, the dairy inspector, had further discussions with me concerning the new barn, and on June the 10th, 1963 he has the notation that we began putting the building over the barn setup at that time, and we were in the barn on October the 25th, 1963, milking.

Q Do you have some pictures with you showing the drop gate that you put in your barn?

A Yes, I do.

Q (Indicating.) Here are some closeup pictures of the drop gate which have not been submitted to the Court before.

A I have some smaller pictures of the barn setup, the mechanical — One of those pictures shows the gate [131] which was designed to fall flush with the floor so the cows would not trip on it, nor would they slip on it, and the gate mechanism was to shove the cows, to shove the gate, were fixed in such a way that we could protect the cows from being caught in the gate when it drops, because one time we lost a cow's foot.

Q I will show you "Defendant's Exhibit L", and would you state what that is, please?

A Number "L" is the gate closed, the hydraulic ram pulled up, the water is backed up in the holding area, ponding area, and it's probably 18 inches deep, and I would estimate, I think it's about 12 or 15 hundred gallons of water.

Q It shows the drop gate in place, upright?

A Correct.

Q I will show you Defendant's Exhibit "K" and ask you to state what that is.

A This is the hydraulic ram, one located on each side. These were I believe 3-foot rams in order to give

our extension, and they are 600-pound pressure rams, double acting, in order to give a tight fit to keep the gate under control with the amount of water pressure behind it.

Q And I will show you Defendant's Exhibit "M" and ask you to state what that is.

[132] A "M" is the gate flush down after the water has been or when it goes down, the water flushes out.

Q And what is Defendant's Exhibit "J", sir?

A "J" is a side view of the dam showing the strengthening members of the dam on the side.

Q I will ask you whether or not these pictures show it in the same form and condition as it was put in by you when this dairy was built?

A Exactly.

Q What kind of a floor do you have in your dairy?

A The old milking barn was then turned into a holding barn. We had to knock out some of the old stantions that were in there. We raised the floor, elevated it 6 inches, and we cambered it slightly to the outside and then we left troughs on the outside for the cows to walk down, but it served a double purpose, because as the water flushed down through the old holding barn, the water would pick up the cow manure and work it off to the sides, and it would come, the concentrated water, like a weir, and fall down the east side of the barn and take the head load of the water on out to the manure ponds.

Q What kind of action did you get, then, with the water, when the gate was dropped?

A There would be a swirling action like a dam breaking, [133] the water rushing out over the floor.

Q Did you know whether or not in the early days of this construction and use of this, did Mr. Gribble see it?



A Yes, Mr. Joe Gribble.

Q Do you recall when that was or what the circumstances were?

A I was not there. I did not see him personally. My dairymen said that sometime in 1964 Mr. Gribble came by, and said that we could buy our patent for a dollar. And he told him to leave. Now, my dairymen did not know who Mr. Gribble was or anything about it until Mr. Gribble came back to the ranch here several weeks ago and revisited the ranch under the pretext of selling us some equipment, and our dairymen recognized him at that time. And Mr. Gribble did come by my office, and he was out there several months ago.

Q Going back to the way this dam operates, I will ask you whether or not that dam or drop gate, and I have used — I think we've used those terms interchangably, has an effective control of the water which you can control it any way that you want to?

A Yes, with the hydraulic rams we can control it, and the amount of water that we want to let out. We seldom use it out there.

[134] Q Now, prior to January 1973, were you acquainted with Mr. Bernard A. Sakraida?

A No.

Q Had you had any contact with him?

A I had no contact with Mr. Sakraida at all.

Q Did you meet him in January of last year?

A Yes, I met him in Florida.

Q And I will ask you whether or not anything came up about your dairy and how this thing works while you were — when you saw him in January of 1973.

A I went to Florida to see some of the new operations that were being built down there because I was interested in upgrading our operation, and Mr.

Sakraida's name was given to me as a contractor in the area, and I called ahead and made an appointment to see him and he said that he would show the various dairies that he was building to me at the time, and he took me around for a half a day. It was toward the end of that day that we began talking about the flushing systems, and that's when he brought up that he was being sued.

Q And, what did you tell him with respect to Mission Dairy at that time?

A I told him I had a flushing gate just like that one.

Q And did you tell him how far back?

A I told him it was in operation sometime in October of [135] 1963, and we had designed it much earlier than that.

Q And, subsequent to that, did either Mr. Sakraida or Mr. Tatem get in touch with you for an affidavit?

A After that, Mr. Tatem did get in touch with me about an affidavit, yes, sir.

Q And I will ask you whether or not he saw you in California?

A Yes, he flew out to California and met me in Los Angeles.

Q Is the result that you executed an affidavit?

A At that time we gave him the pictures of our dairy operation.

Q And I will ask you what, if anything you did with respect to getting in touch with other people, inquiring about water flush systems and dairies and — in the California and Arizona area.

A Well, 13 or 14 years ago is a long time, and a lot of water has gone over the dam, so to speak, and I am — This flush system was not a major thing, as far as we were concerned. My main reason or interest was the



economics of the operation in dairy equipment and milking equipment and all the other things, and consequently I didn't document or anything these kind of things, and I had to try to think what I saw and who I saw and try to remember everything, and that [136] was prompted by Mr. Gribble's asking me if I had my dairy or this particular thing in publication.

Q And I will ask you whether or not after you had contacted various dairy people out there in California or Arizona about the water flush systems used years ago, did you contact either Mr. Sakraida or Mr. Tatem?

A Yes, I did. I contacted — tried to pick up the traces of where I got my ideas and where I had been.

Q I will ask you whether or not among others that you contacted was Mr. Rovie, Mr. Souza, and Mr. Whitman?

A I contacted Mr. Souza, Mr. Whitman and who is the other person, Mr. Rovie?

Q Yes.

A And I contacted other people, and I tried to find DeCarli, and I contacted a Mr. Higgins who has given all his data to the University of California. He was a free-lance writer and published some papers in California, and I contacted the librarian to find out what information I could, and I contacted people back in other places that I thought might have some information for me.

MR. HULSE:

I believe that's all the questions I have.

THE COURT:

Mr. Kolisch?

[137] MR. HULSE:

Oh, I would like to offer these exhibits which are "J", "K", "L" and "M", I believe.

THE COURT:

If there are no objections? They will be received in evidence.

(WHEREUPON, at this time, discussion out of the hearing of the Court Reporter, off the record.)

MR. KOLISCH:

Subject to the same reservation I made with respect to the other witnesses, Your Honor, on the merits.

CROSS EXAMINATION

QUESTIONS BY MR. KOLISCH:

Q When was the first time that you became aware that the flush system which you have, or had, at the Mission Dairy was similar to the manure flush system which had been developed by Gribble and Bennett?

A The first time that I became aware that mine was the same, (Pause) I became aware of the flush system from Mr. Holm.

Q Mr. Holm is at the Ross Holm company?

A That's right.

Q And what was the date that Mr. Holm was aware of that system?

[138] A I showed him my plan, my ideas, and that's when — That was sometime in, oh, March of '62.

Q And did Mr. Holm tell you at that time about the *Sweet* Dairy —



A That's the dairy that he was putting his fully automated equipment in, and that was the first dairy that he was installing this in.

Q And did he discuss with you the flush system at the Sweet Dairy?

A No. I showed him what we had in mind and he said "That's similar to what they are doing up there."

Q And did he indicate to you what the stage of completion of the work was in?

A No. I don't understand what you mean.

Q Did he indicate what the status of the *Sweets* Dairy was?

A Well, —

Q In other words, was it under construction, or finished or what?

A It was under construction and it was finished. The automated equipment was in the process of being completed.

Q When you say "automated equipment," you are talking about the milking part?

A Right.

[139] Q He did not specifically discuss with you what the flushing system was at the —

A No.

Q Other than after looking at yours, to say, "That's similar to ours."

A He said, "I made mine like that, too."

Q When is the first time that you became aware of the Gribble and Bennett patent?

A Well, again, Mr. Gribble came by and offered us to buy the patent for a dollar. I guess that that might be the first time that somebody was trying to sell us a patent.

Q You were personally offered this?

A No, it was hearsay from my dairymen.

Q Tell us in as much detail as you can what your dairy manager told you about it when this was and what his name was.

A Again, I don't know the exact date, because I can't pin it down. I know that sometime in 1964, '65, somebody came by and offered us, gave us the chance to buy the right for a dollar.

Q Would it refresh your recollection if I told you that the Gribble and Bennett patent was issued at the end of December of 1965?

A Yes, I guess it must have been after that time.

[140] Q This is what I asked you the first time.

A I don't know.

Q You don't know?

A I don't know.

Q All right. Who was your dairy manager?

A Dick Ripley.

Q And what did he tell you?

A That somebody came down and offered us the right to buy a patent on our equipment for a dollar.

Q Was this a proposal to sell you some rights to the patent?

A I don't know what he was showing, I guess the rights. But I wasn't there. I guess that's all he could sell.

Q And did you then get any information concerning this patent?

A No.

Q Did this interest you in any way?

A No.

Q At any time, did you ever make any attempts to maintain the operation of your flush system at the Mission Dairy a secret?

A No. But it was in a place that it wouldn't been



seen very easily. I never maintained a secret about anything about it. I opened up my ranch to anybody who was interested.

[141] Q That is my next question. Have you ever put your ranch off-limits to anyone?

A I did to Mr. Gribble when he came by here to my office about three months ago.

Q When Mr. Gribble came by, did he introduce himself?

A Yes.

Q You knew who he was; he didn't try to hide his identity?

A He was going all over the county talking to different people, and I knew of his existence because of people telling me.

Q But as far as you were concerned, he came in and introduced himself to you?

A He phoned and I let him come in.

Q At that time did you show Mr. Gribble your flushing system?

A No, he was in my office. My office is in Salinas.

Q Yes, but have you instructed anybody that he shouldn't see your flushing system?

A Up until that time?

Q Yes.

A No.

Q Did you ever instruct Mr. Ripley not to permit a Mr. Wisdom to see the flushing system?

A Yes. I did, but not with respect to Mr. Wisdom, but [142] with respect to people inquiring about it about that time, yes. That's right, I did. I told Mr. Ripley not to let people see it.

Q Why did you want to shut it off where no one could see it?

A Because I had heard of the suit filed against a dairyman down in Los Angeles.

Q And, why were you concerned?

A I wasn't concerned about it. It was just a matter of nuisances.

Q If I understand your testimony correctly, up until that time, you hadn't told me what date that was that you made some kind of restriction that —

A Asking questions, not visiting. Just asking questions.

Q Oh, your ranch was always open?

A That's right.

Q So Mr. Whitman or anybody else could come in, and they could always come in and see what it was?

A That's right.

Q As far as you are concerned, you had never denied anyone access?

A Not — No.

Q Your denial was with respect to giving information?

A That's correct.

Q And you wouldn't permit Mr. Ripley to discuss any [143] dates in connection with your operation?

A That's correct.

Q During what period of time did you exercise that restraint?

A That was at the time that I had a court case pending. With the A. F. Smith Company.

Q What has the A. F. Smith Company case have to do with a patent case with Mr. Gribble and Bennett?

A I was having problems with a court case with A. F. Smith Corporation. We were having the same thing of people coming by and asking questions. That was the time I instructed Mr. Ripley not to answer any



questions about any of the equipment on the ranch.

Q As to what period of time did you —

A There was no limitation on it. It was just "Don't get involved with people who are asking questions about the equipment."

Q And did you subsequently change that order to Mr. Ripley?

A No.

Q Does that still stand?

A Yes, sir.

Q When did you decide to provide Mr. Sakraida and his attorneys with the information concerning this?

A When I talked to Mr. Sakraida down in Florida, because [144] it seemed so unfair to me to have this thing going throughout the United States, with the problems that were created with it.

Q At any time were you ever advised that if the Gribble and Bennett patent was upheld, your installation might be an infringement?

A No.

Q You were not aware of that?

A No.

Q Is this the first time you have become aware of that fact?

A Naturally I have been talking to attorneys, and this kind of thing has come up now, but —

Q I asked you when you first became aware of the patent — the fact that your installation is, if it did not in fact predate, would be an infringement?

A I guess when I read your return to the Complaint, yes, sir, that was filed in the Fifth Court of Appeals.

Q And in your discussions with Mr. Sakraida, did that subject ever come up?

A No.

Q You were never concerned?

A I designed it, and I know exactly how I designed it. Furthermore, I have seen the one up at Piney Hill, and several years later, and it wasn't holding up at all. [145] It was leaking from all sides.

Q When was this?

A Oh, sometime in '66. They had an open house up there.

Q Prior to January, 1973, were you ever approached by anyone with respect to providing information which would be helpful to the defendant Sakraida?

A Prior —

Q To January, 1973.

A I was not approached by anyone.

Q Do you know if anybody in any of your organizations in which you are connected was approached?

A Not that I know of.

Q What were the names of the individuals connected with Ross Holm who worked at your installation, in addition to Mr. Bill Holm?

A I don't remember.

Q Do you have any dated plans or drawings of your flushing system?

A The only dated plan I have is the Soil Conservation plan. All of my plans were destroyed in a fire, and I do not have any plans as such. There was no need for this type of plan.

Q When were these pictures, Exhibits "J, K, L, M," shown, or taken?

A I don't know. They are not dated on the back.

[146] Q Does the operation shown on these pictures show your operation as it exists today?



A No. We have gone to a sprinkler-type system. If they do use it, it would be only occasionally. I am not there all the time. It takes about three or four minutes to fill the gate up, and it takes about one second to drop it, and that's all that's done in a day's time. So you have to be there right at that time to see it.

Q And approximately when did you install this sprinkler system?

A Well, I think about two years ago.

Q Do you know a Mr. W. C. Fairbank?

A Yes, I do.

Q How long have you known Mr. Fairbanks.

A Well, I guess I have been acquainted with him since I knew him up at the University of California. I only know that now because we have some correspondence. I wouldn't have been able to recognize him.

Q Would it be correct to say that you did know him during the '60's?

A I guess it would be correct, just as any other person in school would be.

Q Did you know anything about anything concerning his visit at the Mission Dairy?

[147] A No.

Q The testimony that you gave concerning various flushing systems, which you studied and visited and examined, throughout the period, I think, sometime when you first decided to make improvements to the Mission Dairy, and up until at least the end of 1971, to your knowledge, was all this information publicly available?

A Yes.

* * * *

[153] MR. KOLISCH:

Your Honor, we have Mr. Gribble here, and it had been my intent if you were going to go into this matter, to put Mr. Gribble on.

THE COURT:

Well, let me ask you, I imagine all he [154] will do is deny some of the testimony that's given by their witnesses, and that would do no more than raise a fact issue. Is there any need — I don't have any objection to your putting him on, but I will have to judge the newly discovered evidence, and aside from whether it was obtained by a showing of no lack of diligence, strictly on the basis of what that evidence is, obviously the testimony of your client is newly discovered evidence, and certainly do no more than join the issue with that newly discovered evidence on the trial of the case on the merits, and I don't think that I am required, as I said, I am going to find that the only action that I am mandated to take by the Court of Appeals is as follows: And that is to hear and determine the defendant's motion for new trial, allegedly based on newly discovered evidence. That's a quote. And to "certify to the Fifth Circuit Court of Appeals the entire record, including the opinion and order of a trial Court and the testimony taken on a new trial on the new trial issue"; and thirdly, thereafter, the parties will go back to the Court of Appeals and file supplemental briefs and after which any additional issue as to the validity of the patent will rest exclusively with the Court of Appeals. And I don't see why I would want to hear any testimony that would join issue and dispute what they [155] have said. I will take judicial knowledge of the fact, based on the testimony given at the prior trial,



which I am familiar, that he is going to take issue with them, with this testimony.

MR. KOLISCH:

I think additionally if Mr. Gribble were to testify, we would also bring out, and I think it has probably already been brought out, the connection between the people that installed the *Sweets* Dairy and the (partly) inaudible) . . . 6's . . . This is where Gribble and Bennett made their first installation, and they started this work in 1961 and it was finally completed at the beginning of 1963. And you will recall that there was testimony with respect to the Ross Holm people who were working on the Mission Dairy.

* * * *

[156] MR. KOLISCH:

Yes, Your Honor. I think specifically we have to deal with the question of the Mission Dairy, which we will concede from the information that we have, that this stuff is substantially the same as what was developed by Gribble and Bennett.

* * * *

[163] MR. KOLISCH:

And I would represent to the Court that the issue of whether or not the defendant was diligent is one on which we would be entitled to put on evidence, namely in respect to the Meyer Dairy.

THE COURT:

The evidence was closed yesterday, Mr. Kolisch. I am here now to rule. That's all I had you back here for.

The evidence was closed last night. I could have ruled by sending you an order.

MR. KOLISCH:

I misunderstood that, and the Court's disposition of the case yesterday.

THE COURT:

All right. I find that the evidence adduced under the motion for new trial based on newly discovered evidence would, standing alone, and unchanged and uncontroverted by opposing evidence, would overcome the judgment, since the evidence clearly shows that this flushing system was not new, not novel and did not meet the test of non-obviousness, and the prior use of the flushing systems was thus in anticipation of this patent. I will enter an order this date to this effect. That's all, you are excused.

(WHEREUPON, end of proceedings.)